



REVISED DISCUSSION PAPER 138

PROJECT 138
THE PRACTICE OF *UKUTHWALA*

OCTOBER 2015

CLOSING DATE FOR COMMENTS:
31 JANUARY 2016

ISBN: 978-0-621-44138-3

First published

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the SALRC are –

The Honourable Madam Justice Mandisa Lindelwa Maya (Chairperson)

The Honourable Mr Justice Narandran (Jody) Kollapen (Vice Chairperson)

Professor Vinodh Jaichand

Mr Irvin Lawrence

Advocate Mahlape Sello

Ms Thina Siwendu

Professor Marita Carnelley

Professor Annet Oguttu

The Secretary of the SALRC is Mr Nelson Matibe. The project leader appointed for this investigation is Professor Thandabantu Nhlapo. The researcher assigned to this investigation is Ms Maite Modiba. The Commission's offices are at Spooral Park Building, 2007 Lenchen Avenue South, Centurion.

On 14 June 2011, Mr JT Radebe, the Minister of Justice and Constitutional Development, appointed the following advisory committee (the Committee) members to assist the SALRC in developing the discussion paper:

Professor Thandabantu Nhlapo, University of Cape Town (Chairperson)

Professor Richman Mqeke, Rhodes University

Professor Thenjiwe Meyiwa, Durban University of Technology

Professor Pearl Sithole, University of KwaZulu Natal

Judge Yvonne Mokgoro (until 31 December 2011)

Judge Mandisa Maya (from January 2014 until February 2015)

Professor Marita Carnelley (from March 2015)

Correspondence should be addressed to:

The Secretary

South African Law Reform Commission

Private Bag X668

Pretoria

0001

Telephone: (012) 622 6322

Fax: (086) 511 8811

E-mail: *maimodiba@justice.gov.za*

Website: *<http://www.salawreform.justice.gov.za>*

Introduction

The SALRC published Discussion Paper 132 (Project 138: The Practice of *Ukuthwala*) on 31 August 2014 to elicit responses from various stakeholders and to serve as a basis for SALRC deliberations and for drafting the Bill. After receiving comments and responses on the matter, the SALRC decided to publish the Revised Discussion Paper, which includes a chapter on public consultations and the Draft Bill. This discussion paper is the revised version of the Discussion Paper 132 (Project 138: The Practice of *Ukuthwala*).

This discussion paper reflects information accumulated up to the end of July 2015. The paper has been prepared to elicit responses from various stakeholders and to serve as a basis for SALRC deliberations. Following an evaluation of the responses and any final deliberations on the matter, the SALRC may issue a report on this subject, which would be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament.

The views, conclusions and recommendations in this paper are not the final views of the SALRC. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focussed submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked “Confidential”. Respondents should be aware that the SALRC may in any event be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations.

Respondents are requested to submit written comments and representations to the SALRC by 31 January 2016 at the address appearing on the previous page. Comment can be sent by email or by post.

This document is available on the Internet at <http://salawreform.justice.gov.za>

Contents

Introduction.....	iii
GLOSSARY OF TERMS	vii
CHAPTER 1	1
INTRODUCTION	1
A Background to the investigation on <i>ukuthwala</i>	1
B The investigative approach	3
CHAPTER 2	4
UKUTHWALA AS A CUSTOM IN SOUTH AFRICA.....	4
A Introduction.....	4
B <i>Ukuthwala</i> : concept and context.....	5
C Safeguards against abuse	10
D <i>Ukuthwala</i> in the context of “sanctioned customary options” versus harmful practices...	11
CHAPTER 3	13
UKUTHWALA IN SOUTH AFRICA: MAPPING THE TERRAIN	13
A Introduction.....	13
B Varying views on <i>ukuthwala</i>	14
C Occurrence and prevalence of <i>ukuthwala</i>	15
D <i>Ukuthwala</i> cases and incidents of note	16
E Nature and scope of the problem	18
F Responses to the revival of the custom.....	20
G Responses to the practice of <i>ukuthwala</i>	22
CHAPTER 4	25
PUBLIC CONSULTATIONS	25
A Introduction.....	25
B Views on <i>Ukuthwala</i>	25
C Stakeholders’ views on possible interventions	28
CHAPTER 5	31
THE LEGAL FRAMEWORK.....	31
A Introduction.....	31
B Legal framework	33
1 The Constitution.....	33

2	South Africa's obligations under international law.....	36
3	Domestic law.....	41
CHAPTER 6		53
LAW REFORM OPTIONS		53
DRAFT PROHIBITION OF FORCED MARRIAGES AND CHILD MARRIAGES BILL		57
SOURCE LIST		61

GLOSSARY OF TERMS

(Alphabetical by language group)

1. IsiNdebele

- *ukweba umakoti* – literally “to steal a bride”; to carry off a girl for the purpose of marriage

2. sePedi

- *tšhabiša* – to carry off a girl for the purpose of marriage
- *sego sa metse* – literally “water carrier”, which is the ritualistic request to a girl’s parents sent by a boy’s family to indicate their offer of *ilobolo*
- *matshwara* – fine paid to a girl’s parents
- *nyakelang ka mona* – literally “if you have lost a daughter, look for her in this direction”

3. seSotho

- *shobedisa* – to carry off a girl for the purpose of marriage

4. siSwati

- *kumekeza* – ritual wailing and dancing by a bride in the cattle byre to introduce herself to the groom’s ancestors on the day of her wedding
- *kugcotshiswa libovu* – smearing of a bride with red ochre by the groom’s family; this can sometimes be forcibly applied as a prelude to marriage negotiations
- *kuteka* – to marry a woman; “to take unto wife”

5. xiTsonga

- *tlhaka* – carrying off a girl for the purpose of marriage, initiated by the girl
- *tlhakisa* – carrying off a girl for the purpose of marriage, initiated by the boy
- *lavelani haleno* – literally “if you have lost a daughter, look for her in this direction” (similar to “*nyakelang ka mona*” in sePedi)

6. tshiVenda

- *taha* – to carry off a girl for the purpose of marriage, initiated by the girl
- *tahisa* – to carry off a girl for the purpose of marriage, initiated by the boy
- *khombe* – a man who has difficulty finding a wife, a bachelor
- *mutshelukwa* – a woman who has difficulty finding a husband, a spinster

7. isiXhosa

- *ukuthwala* – to carry off a girl for the purpose of marriage
- *ukuhlolela* – soliciting or searching for a husband for an eligible young woman, or for an older woman whose marriage options are considered slim
- *unozakuzaku* – a go-between or representative of the suitor's family or the prospective bride's family in marriage negotiations
- *ukugcagca* – elopement

8. isiZulu

- *ukuthwala* – to carry off a girl for the purpose of marriage
- *ilobolo* – the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xurna*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage
- *umkhongi* – a go-between or representative of the suitor's family or the prospective bride's family in marriage negotiations (similar to “*unozakuzaku*” in isiXhosa)
- *ukubaleka* – in a sense, the reverse of *ukuthwala*: a woman identifies a man she desires and elopes to his home of her own volition, thus placing pressure on him to pay *ilobolo* to have her as a wife

CHAPTER 1

INTRODUCTION

A Background to the investigation on *ukuthwala*

1.1 On 24 August 2009, the South African Law Reform Commission (the SALRC) received a request from the Gender Directorate¹ to include in its law reform programme an investigation into the practice of *ukuthwala*. The Gender Directorate further requested that this investigation should receive priority attention. Aspects to be considered included the following:

- the impact of *ukuthwala* on the girl-child;
- the appropriateness and adequacy of the current laws on *ukuthwala*, and whether or not the laws uphold the human rights of the girl-child (taking into consideration the principle of “the best interest of the child”).

1.2 It is evident from the motivation by the Gender Directorate in its request to the SALRC that the request was prompted by the SABC and eTV evening television news coverage of 15 March 2009. These bulletins had included reports on the prevalence of “forced marriages” and the “sale” of young girls into marriages with older men. The practice reportedly occurred mainly in Eastern Pondoland in Lusikisiki, Flagstaff, Bizana and other areas in the Eastern Cape Province. According to the Gender Directorate, the news coverage also revealed that:

- girls between the ages of 12 and 15 years are subjected to *ukuthwala*;
- such girls are at times forced to marry men who are HIV positive;
- about 89 girls from the areas mentioned above were hiding in Gauteng and KwaZulu-Natal in fear of becoming victims of the practice;

¹ The Gender Directorate is part of the Department of Justice and Constitutional Development

- the practice of *ukuthwala* was defended as being a traditional cultural practice, with adherents claiming that the tradition allows a man to abduct a woman whom he wishes to marry, even if he has not proposed love; and
- such abductions mainly happen when young girls are on their way to school or are fetching water or wood.

1.3 The Gender Directorate also informed the SALRC that an *imbizo* in the Eastern Cape was organised by the then Minister in the Presidency, the late Dr Manto Tshabalala-Msimang. The meeting was attended by traditional leaders and members of communities affected by the practice. It transpired that *ukuthwala* is still practised in that area and largely affects children between 11 and 15 years from poor or child-headed families. The members of the community complained that when law enforcement officials and traditional leaders are asked to intervene, they refuse on the basis that *ukuthwala* is a cultural practice.

1.4 The Gender Directorate laments the fact that children and adolescents affected by this practice, whose rights to personal safety and wellbeing are being violated, are at risk of lifelong developmental burdens – including HIV infection and other physical, emotional and social problems. The Directorate also stressed that South African values, beliefs and practices must be consistent with the Constitution of the Republic of South Africa, 1996, which specifically guarantees the rights of children. The Constitution includes the right to basic education, the right to equality, security of the person, dignity, and freedom of religion and of thought.

1.5 On 28 August 2009, the Commission assigned the proposal to investigate *ukuthwala* to Mr Mdumbe, a Principal State Law Adviser at the SALRC. His first task was to undertake a preliminary investigation to determine the feasibility of including a full investigation in the SALRC programme. However, in March 2012 Mr Mdumbe was seconded to the Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement (the Arms Procurement Commission) as Head of Legal Research. The Commission therefore appointed another SALRC researcher to the *ukuthwala* project in September 2012, namely Ms Maite Modiba.

B The investigative approach

1.6 Formulation of this paper has followed a qualitative methodology with elements of desktop review geared towards an understanding of *ukuthwala*. Research to date has involved examining media and public concerns over the last few years, communicating with stakeholders (especially civil society organisations), and a preliminary analysis of the policy and legislative framework to determine whether the concerns raised are covered by legislation. This has been the approach adopted by the Committee appointed by the SALRC during its work on this issue since 2011.

1.7 Between 2009 and early 2014 it has become clear that there are obstacles to collecting statistical data to assess the prevalence of *ukuthwala*. This is unsurprising given the elusive nature of the practice and indications that the perpetrators do not want to be known. Even the media reports that have been brought to the attention of the SALRC do not dwell on the identity of the perpetrators. It has also become clear that there are “hot spots” within South Africa where the practice is rife. Because of these circumstances, the Committee has done the following:

- desktop research on *ukuthwala*;
- engaging with stakeholders through a tool developed by the Committee;
- legislative analysis to examine whether there are gaps in addressing the problem of *ukuthwala* in its negative form, and how victims can be assisted.

CHAPTER 2

UKUTHWALA AS A CUSTOM IN SOUTH AFRICA

A Introduction

2.1 Traditionally, in indigenous African communities a marriage was initiated through a request or approach from the family of the prospective groom to the family of the woman. Ideally, such an approach would follow a period of courtship between the intended spouses, and the ensuing negotiations would thus occur with the full consent of the couple. Occasionally, the talks between the families were conducted without the knowledge of one or both of the youngsters, with consent being obtained after the fact of parental agreement. Due to the strongly pro-marriage and pro-natalist values of these societies, even irregular forms of entering into the married state were countenanced, and avenues were created to regularise various forms of marriage initiation which might have been initially flawed.

2.2 In its original form, *ukuthwala* was one of the “irregular” approaches observed predominantly by the Nguni-speaking groups.² The practice has been vividly described by Koyana and Bekker as follows:

The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her home, quite late in the day, towards sunset or at early dusk, and they will “forcibly” take her to the young man’s home. Sometimes, the girl is caught unawares, but in many instances she is “caught” according to plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when, in fact, it is hardly ever so.³

² However, there is documented evidence of its existence among Sotho-speaking communities, as well as among the Venda and Tsonga peoples.

³ Koyana DS and Bekker JC “The Indomitable *Ukuthwala* custom” 2007 *De Jure* 139-144.

2.3 Although the above description is useful to an extent, taken out of context it may create confusion as to whether *ukuthwala* is a crime or a social practice that is acceptable in communities. This confusion is compounded by the fact that many writers refer to *ukuthwala* as a custom or a cultural practice, thus downplaying the subjective circumstances that lead to its occurrence. This paper begins by clarifying this issue, highlighting the extent to which the practice is sanctioned by custom and the extent to which it is prone to abuse. Important issues include the age of girls affected, and the nature of the practice – specifically whether it involves human rights violations.

B *Ukuthwala*: concept and context

2.4 *Ukuthwala*⁴ as described above involves the act of taking a marriage partner in unconventional ways, seemingly forceful ways, sometimes with the sanction of certain adults who have a stake in the possibility of formalising a resulting partnership. It is practised among indigenous African communities in Southern Africa, in various mutations, within the context of many other customary practices related to marriage. Many of these practices are aimed at satisfying the traditional standards or norms relating to marriage, and sometimes accommodate unconventional ways of doing so. Although often referred to as custom, tradition or even culture, *ukuthwala* can actually be seen as a strategy to counter the influence of extreme authority. The overbearing preferences of people who hold traditional or cultural power and control over the lives of young men and women seeking to establish conjugal relationships may, therefore, be linked to some instances of *ukuthwala*. Popular references to *ukuthwala* as “culture” thus unduly create an impression that the practice is a rigid and formalistic prescript, whereas it was originally devised as an optional “safety valve” against too extreme a parental authority.

2.5 A dictionary definition of *ukuthwala* describes it as “[to] carry on head or shoulders or load gripping by the hands”.⁵ This is the basic meaning of the word “-*thwala*”. Other definitions are more figurative and may include a mention of “pregnancy” and “carrying a bride home”. One aspect of *ukuthwala* includes the concept of taking a partner in unconventional ways; in this

⁴Also called *shobedisa* in Sesotho; *ukweba umakoti* in isiNdebele; *ukuthwala* in isiXhosa; *ukuthwala* in isiZulu; *tjhabisa* in sePedi; *tlhakisa* or *tlhaka* in Xitsonga/Shangaan; and *taha* or *tahisa* in Tshivenda

⁵ In Doke C.M, Malcolm D.M, Sikakana J.M.A and Vilakazi B.W, English-Zulu/Zulu-English Dictionary 2008: 811

sense, the term indicates a breaking of standard practice in initiating a relationship, where such practice would usually include formalising a relationship between the families of the lovers. Even before formal engagement (*ukuganiselana*) occurs, in African indigenous families the acceptance of love is seen as a public matter, with such publicity endorsing the choices made by the lovers and attracting the endorsement of the families involved. If the lovers or their families change their minds, or if the desired endorsement by one's family is lacking, a "drastic plan" must be devised and may involve one or both of the lovers. This plan may be drastic in its response to parental authority, but traditionally it did not involve culturally offensive behaviour such as rape, violence, or criminal abduction. It allowed people to side-step a particular set of circumstances created by parental disapproval or other pressing personal circumstances.

2.6 Mwambene and Sloth-Nielsen (2011,) define *ukuthwala* in this way:

The word *ukuthwala* means 'to carry'... . It is culturally legitimated abduction of the woman whereby, preliminary to a customary marriage, ... a young man will forcibly take a girl to his home... . Some authors have described *ukuthwala* as the act of 'stealing the bride'... . *Ukuthwala* has also been taken as a mock abduction or irregular proposal ... aimed at achieving a customary marriage... . From these definitions we see that *ukuthwala* is in itself not a customary marriage or an engagement. The main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage. (Emphasis in original.)

2.7 Bennett (2010) describes *ukuthwala* as one of the unconventional methods of "opening marriage negotiations". He discusses it together with *ukubaleka*, which is when a woman goes to a man's home and in so doing "forces" him to "take" (accept) her, thus eliciting payment of *lobolo* to her family.⁶ Bennett (2010, p 7) argues that:

Thwala is more common irregular mode. It generally takes the form of a mock abduction whereby a suitor and his friends 'kidnap' the girl and carry her off to his homestead.... The suitor need not himself participate, since the event might be organised by his friends or even by the girl's guardian.... The 'kidnapping' party would wait until early evening, when the girl could be waylaid and taken off to the suitor's homestead. She might be caught unawares, or she herself might be in on the plot. In either event, she would

⁶ In fact Krige (1936) sees *ukuthwala* as a form of forced *ukubaleka*. She argues: "There is a form of forced *ukubaleka*, known as *ukuThwala* which takes place sometimes when an engaged girl breaks her contract" (p.125). Krige, E.J. (1936) *The Social System of the Zulus* Pietermaritzburg, Shuter & Shooter

be expected to put up a show of resistance, for to acquiesce willingly would be to show a lack of maidenly pride.

2.8 In a special focus page in *The Daily News* (4 December 2013 p 10), Nomagugu Ngobese, the head of the Nomkhubulwane Culture and Youth Development Organisation, is cited as describing *ukuthwala* as a plot staged by a young couple to force the girl's parents to accept *lobolo* from the boyfriend, whom the girl loves but her parents do not like. In this sense it is a collusion between people who desire each other or are already in a relationship and wish to formalise it despite resistance from their families. Such definitions are important in assessing whether *ukuthwala* is sufficiently covered in legislation in a manner which limits the abuse of human rights but allows communities to practise what is not at odds with human rights.

2.9 Mwambene and Sloth-Nielsen (2011) raise the question of whether statutes such as the Children's Act sufficiently protect the girl child, and whether they empower legal practitioners sufficiently to protect the girl child against the abuse of *ukuthwala*. The authors make several observations, including a comment on the language of the Children's Act, which in section 12(2)(a) and (b) discusses the "giving out" of a child to marriage without that child's consent. Mwambene and Sloth-Nielsen debate whether this phrasing aligns with the concept of *ukuthwala*, which emphasises the "taking of girls" (whether by force or collusion). There are other issues around definitions; for example, how to assess whether *ukuthwala* is a custom that is not detrimental to the child (as envisaged by section 12(1) of the Children's Act), which would require a definition of age and an understanding of what *ukuthwala* is. The fact that the practice varies and depends on circumstances raises the question of how to identify the basic elements that would constitute "detriment" (see Chapter 4 of this paper for further detail on this point).

2.10 In summary, the practice of *ukuthwala* was traditionally resorted to most often in one or more of the following circumstances, which occasionally overlapped:

- 1) to circumvent an arranged marriage;
- 2) to circumvent parental opposition to the match (which may or may not be based on the fact that the girl has been promised to someone else in marriage);
- 3) to "fast-track" marriage negotiations where timing is an issue (such as when the girl is pregnant);
- 4) to force the hand of the parents if a boy (the prospective husband) is too poor to afford *lobolo*;

- 5) to speed up marriage negotiations in response to peer pressure on either the girl or the boy to get married (with such pressure usually affecting girls more than boys);
- 6) to speed up the process of an arranged marriage; or a marriage desired by at least one set of parents, in which case *ukuthwala* takes place with parental collusion.

2.11 It is important to emphasise that *ukuthwala* is circumstantial, and certain cases involve more violation than others. Various authors⁷ have identified at least four possible scenarios in which *ukuthwala* has been used as a solution:

- 1) The girl is aware of the plot and colludes with her lover;
- 2) Families agree on the (potential) marriage, with or without the girl's knowledge;⁸
- 3) The girl would not have given her consent, but the *ukuthwala* pressures her and her family into consenting;
- 4) *Ukuthwala* as a solution for men or women who have remained unmarried for a long time.⁹

2.12 Whatever the circumstances that led to *ukuthwala*, the act of a man carrying a woman was used to initiate discussions between the families. Certain behaviour would have been deemed culturally offensive. Bennett (2010 p 7) argues that –

The custom of *thwala* did not contemplate sexual intercourse, at least not until the girl's status as a bride had been duly fixed. Traditionally, as soon as she arrived at the suitor's homestead, she would have been placed under the care of the women in his family. If the suitor were to have sex with her, he would be required to pay seduction damages in addition to the lobola cattle....

2.13 In the final analysis of the concept, is important to make the following observations:

- *Ukuthwala* is not a formal procedure towards marriage but an option that may be used to solve the problematic circumstances of lovers (and in some cases, certain family members), where social expectations are at odds with the lovers' own wishes.
- *Ukuthwala* may enable a solution and facilitate social negotiations, and it does not necessarily involve culturally and socially offensive behaviour such as violence or rape.

⁷ See for example Van Tromp *Xhosa Law of Persons: A treatise on the legal principles of family relations among the amaXhosa* 1947; Mwambene & Sloth Nielsen, 2011; Kuhn and Sithole [undated]; Bennett 2010.

⁸ *Ukuthwala kobulawu* in isiXhosa by Van Tromp *Xhosa Law of Persons: A treatise on the legal principles of family relations among the amaXhosa* (1947).

⁹ See Kuhn and Sithole in their discussion of *taha* and *tahisa* in Tshivenda.

- It is a customarily accepted way to shift the focus of social authorities, families in particular, to accommodate the wishes and preferences (sometimes including a change of heart) of individual men and women in the establishment of relationships.
- *Ukuthwala* is thus a ploy to negotiate social relationships within prescribed values; in the new South Africa these values include human rights and socio-cultural norms and standards.
- As a practice, it does not silence families and community authorities in objecting to human rights violations.

2.14 Notwithstanding the logic of *ukuthwala* in its proper context, it is clear that there is abuse of this practice. In large measure the context has changed; few, if any, communities still exist in which a commitment to a relationship is a public matter. Studies in local communities in southern Africa during the last few decades have shown that community members are mobile and that young people attend school. No research evidence has suggested that love affairs are a public matter within a localised setting, as was the case before (see, for example, the discussion by authors such as Pauw¹⁰ and Sithole¹¹ and on social change over time).¹² Therefore questions must be raised as to whether – even in its properly conceived logic – *ukuthwala* is still relevant. More pressing is the need to deal with abuse of the custom. Measures to curb such abuse and deal decisively with people who violate others’ human rights in the name of culture must be devised. It is against this background that the current project has developed.

2.15 The law must empower society and the state to deal with human rights violations. The discussion above has highlighted the following considerations, which are tabled here as part of the enquiry to identify the best way to deal with human rights violations related to *ukuthwala*:

- Should *ukuthwala* be abolished, because the context in which it was applicable is virtually extinct? Such abolition would mean that people who abuse the practice in the name of tradition – but in fact devoid of context – could be challenged without

¹⁰ Pauw 1963

¹¹ Sithole 2002

¹² Change has been taking place holistically and over time, linked to changes in economic systems; see Pauw, B.A. (1963) *The Second Generation: A Study of the Family among Urbanized Bantu in East London* Cape Town, Oxford University Press. See also Sithole, M.P. (2002) “Zulu” in Ember, M., Ember, C.R. & Skoggard, I. (eds) *Encyclopaedia of World Cultures: Supplement* New York Macmillan Reference USA.

ambiguity. However, it might be difficult to dictate that the custom is entirely irrelevant for all communities and individuals.

- Should current policies and statutes (e.g. the Recognition of Customary Marriages Act)¹³ be amended to spell out culturally sanctioned options such as *ukuthwala*? This runs the risk of codifying and thus legalising “customary options”, which were never as formal, into law and rendering them normative, even if social trends indicate that they are actually phasing out.
- Should the law provide basic human rights prescripts that must be observed by all processes and procedures relating to marriage?

2.16 If possible, the law reform process should insert provisions into statutes that regulate specific matters, such as marriages, stipulating that customary processes must not violate human rights. This would obviate the need to explicitly legalise practices such as *ukuthwala*. Such provisions would not prevent societies from practising those customs and would not brand cultural traditions as barbaric but would prevent people from abusing those customs. The inserted provisions should, where possible, make mention of relevant customary practices without working them into the statutes as normative procedures.

C Safeguards against abuse

2.17 According to Bennett (2004), safeguards were in place to ensure that the custom was not abused.¹⁴ The safeguards were as follows:

- The people who effected *ukuthwala*, particularly the family of the intended groom, were required to inform the guardian or father of the girl on the day she was abducted, or early the following day, that she was with them. They were also required to indicate what amount in cattle they proposed to pay, and by when.

¹³ Recognition of Customary Marriages Act 120 of 1998. This Act defines “customary marriage” as a marriage concluded in accordance with the customs and usages traditionally observed among indigenous African peoples of South Africa, and which forms part of the culture of those people.

¹⁴ TW Bennet “Customary Law in South Africa” (2004) 212. See also JC Bekker “Seymour’s Customary Law in Southern Africa” (1989) 98.

- It was contrary to customary law for a man to have sexual intercourse with a girl who had been “abducted”.
- The suitor was required to report his actions to his family head, who would then give the girl over to the care of the women of the family, and would inform the girl’s guardian of the matter.

2.18 These parameters, which were ostensibly aimed at protecting women, were often transgressed. As stated above, in extreme cases rape, violence and other forms of coercion have been used to force women to agree to marriages or unions with men they did not know or love.

D *Ukuthwala* in the context of “sanctioned customary options” versus harmful practices

2.19 The challenge with the history of acculturation is that some elements of sanctioned customary options have been deemed essential and have been elevated to the level of “culture”, as if they regulated society. *Ukuthwala* must be viewed as one such social concept. Certain traditional practices would not, if neglected or not performed, lead communities to lament their absence. Such practices were often simply circumstantial variations performed by individuals who were trying to negotiate their preferences. Thus it sounds odd when strong suggestions are made proposing that *ukuthwala* be inserted into legislation, as was once attempted in KwaZulu Natal (in the Draft White Paper on *Ukuthwala* and Related Practices). Yet it seems that mention of such options must be made, in a bid to regulate their potential abuse under the guise of “culture”.

2.20 There are several customs that could be placed in a category of “questionable codification”, both culturally and legally. These are as follows:

- 1) Customs that were exercised as **options** by individuals, negotiated within the context of socially acceptable standards.
- 2) Customs that were traditionally practised but indicate the **overbearing authority of society over individuals**.

- 3) Customs that are viewed by communities as cultural practices which are basically **harmful to individuals** and at odds with human rights.

2.21 It is important to paint this larger context, because these types of customs are sometimes framed as cultural stipulations that are quite formal, when in fact they have always included elements of option and choice. *Ukuthwala* falls within the first category of these practices. The table below categorises the three dimensions listed above, which are actually continuums – namely personal choice, social authority, and human rights infringement.

Custom-sanctioned practices that favour the preference of individuals	Customs that favour the authority of elders and family	Harmful practices (socially frowned upon; some extinct)
<ul style="list-style-type: none"> • <i>Ukuthwala</i> • <i>Ukubaleka</i> • <i>Ukungena</i> • <i>Ukugcagca</i> • <i>Isithembu</i> 	<ul style="list-style-type: none"> • Arranged marriages 	<ul style="list-style-type: none"> • Genital mutilation • Human trafficking

CHAPTER 3

UKUTHWALA IN SOUTH AFRICA: MAPPING THE TERRAIN

A Introduction

3.1 The practice of *ukuthwala* has come under intense scrutiny through a growing number of revelations that young girls have contracted HIV after being forced into marriage. South Africa prides itself on having a progressive Constitution, a document that is often quoted in contexts ranging from legal debates to radio talk shows. Our Constitution is indeed lauded by many countries, and is often referred to as one of the best constitutions in the world. An important reason for this is its inclusivity in promoting and protecting the rights of individuals and communities, including (for communities especially) the right to freedom of culture, religion and language. It is a Constitution strong on human rights protection. However, in reality and at a micro-community level, in many cases the observance of human rights is weak. *Ukuthwala* has received increased media coverage, which has led, on the one hand, to intense organising by people who believe that human rights abuses are evident in the practice; on the other hand, the practice is defended by groups who claim that the practice is a cultural right. The practice is widely contested and is viewed as a *symbolic* practice by some, as a *custom* by others, and as a human rights violation by still others.

3.2 The *African Business* magazine (November 2011)¹⁵, reporting on the Mo Ibrahim Index on governance in Africa, notes that while this indicator yielded important information on the year preceding its publication, it was disappointing that human rights continue to be violated on the continent. Although Index scores had testified to good economic growth, the neglect of human rights in 37 of the 53 countries in the African continent was noted. Women's rights were among

¹⁵ No. 380, November 2011 edition

the rights that, relative to economic growth within the continent, were deteriorating. In South Africa, the social and economic value of women and girls is clear and has been reported in a number of gender machinery documents. Despite this, social justice advocates have expressed concern about society's lack of recognition of the fact that *ukuthwala* violates human rights. These concerns cannot be ignored. The unbecoming behaviour of abductors, as demonstrated in the evidence below, clearly points to the abuses that women have experienced. As long ago as 1926, Westermarck stated that bride abductions are global, and more recently Thompson (1993) reported the same thing. Research has shown that such practices are not unique to Africa; for example, similar practices exist in Tierra del Fuego among both the Yahgans and the Onas. In South Africa, new cases are reported frequently.

3.3 The effects of the practice on women are reported to have a lasting impact, even into old age, with the experience having left many women scarred and self-doubting for life.¹⁶

B Varying views on *ukuthwala*

3.4 *Ukuthwala* is regarded by its opponents as amounting to the abuse of women. This assertion stems from reported cases of abductions and kidnappings of women and girl children in the name of *ukuthwala*. According to empirical evidence and as reported by the Commission on Gender Equality, abduction and kidnapping incidents are often accompanied by violent sexual abuse. Women's rights advocates are of the view that, despite the diverse cultural, social and political meanings assigned to the practice, *ukuthwala* perpetuates a form of gender-based violence in the context of a culturally sanctioned patriarchy; and that it entrenches patriarchal power. Further, they submit that the practice is tantamount to forced marriage, which is illegal, and argue that forced marriage is a form of exploitation that in essence should be regarded as human trafficking. Such assertions are based on the fact that in recent times the practice has been used to legitimize and validate criminal abduction and the infliction of gender-based violence against minor girl children. Abuses of *ukuthwala* have clearly been perpetrated without the girl's consent and have proven to have an adverse effect on her education, health and physical wellbeing. What human rights activists advocate is in line with a concern raised by the

¹⁶ The *Daily News* of 5 December 2013 reported the story of a woman who, despite enduring and eventually escaping *ukuthwala*, remains scarred by the experience more than four decades after the incident.

1990–2011 United Nations Human Development Report (UNDP) that: “Disadvantages facing women and girls are a major source of inequality. All too often, women and girls are discriminated against in health, education and the labour market – with negative repercussions for their freedoms”.¹⁷ By contrast, *ukuthwala* is viewed by people who support it as a form of marriage negotiation; not yet marriage per se but an “event” leading to the process of marriage. Besides the men who directly benefit from the practice, other people have seemingly come out in support of it. For instance, Nomagugu Ngobese, head of the Nomkhubulwane Culture and Youth Development Organization, asserts that *ukuthwala* “goes back to the days when girls whose parents did not approve of their boyfriends arranged to be abducted so that the families would be forced to allow their marriage”.¹⁸

C Occurrence and prevalence of *ukuthwala*

3.5 Instances of *ukuthwala* commonly take place during times when men, mainly workers in big cities of South Africa, visit their rural homes. They are typically mine workers, factory workers, taxi drivers, and long distance truck drivers, among others. Many cases are reported to have occurred during the festive season as well as during major holidays such as Easter long weekends and school holidays. On returning to their rural villages, it seems that some men feel a heightened and urgent need to have a wife who will be responsible for domestic chores and fulfilling the man’s sexual needs. Some girls have reported that after being captured they were often beaten up and assaulted in many ways if they tried to escape. Violence almost always accompanies these cases. Further reports have revealed the use of substances to coerce the girls into submission, with some also being given *muti* or traditional medicine which weakens them and makes it easier for their abductor to control them.

3.6 A number of *ukuthwala* cases are believed to be concealed, with most being referred to in community discussions and workshops but not overtly pointed out. The Legal Resources

¹⁷ Moletsane R (2011) “Culture, nostalgia, and sexuality education” in Mitchell, C, Strong-Wilson, T, Pithouse, K and Allnutt, S. *Memory and Pedagogy*. New York & London: Routledge.

¹⁸ *The New Age* newspaper, 11 April 2011 “Girls Live in Fear of Being Abducted and Married” <http://www.thenewage.co.za> accessed online 21 November 2012.

Centre asserts that a number of cases are not reported. This is due to a myriad of reasons including socio-cultural values, fear of stigma, the social standing of a family, and the desperation of a girl's parents to receive money or accept cattle for *lobolo*. Poverty and financial strain have been listed as one of the reasons that trigger the practice. Girls have reported that once an "improper transaction" has been carried out, they are often told they are no longer welcome to return to their homes. The Legal Resources Centre states that "Without places to go back to, these girls are forced by circumstance to stay with the man that *thwala'd* them".

3.7 The stigma of "having failed in marriage", which is prevalent within rural communities, contributes to the difficulty of challenging *ukuthwala* as there is a perception that it is shameful to walk away from a marriage. The commonly-held view is that it is a woman's responsibility to ensure that her marriage is successful despite all odds. Should the girl leave the marriage, she will be an outcast in her community and will be viewed as a failure and not "marriage material". These perceptions, accompanied by the fear of being shunned in one's village, discourage victims of *ukuthwala* from reporting their circumstances to the police and pressure them rather to stay with their "husbands". This sense of shame and the associated stigma and social prejudice all make it difficult to obtain precise statistics of incidents of *ukuthwala*.

3.8 It is crucial to view *ukuthwala* as a symptom of the larger issue of gender-based violence and the disempowerment of women and girls. The practice itself is not the issue, but rather the problem is circumstances that create and perpetuate abuse. Gender-based offences should be taken seriously so that perpetrators must stop acting with impunity in their communities.

D *Ukuthwala* cases and incidents of note

3.9 It is impossible to list all the cases of *ukuthwala*. In this section an attempt is made at listing a few such cases, with some concentration on the two provinces that are hit the hardest by the practice – that is, the Eastern Cape and KwaZulu-Natal. In particular, the Oliver Tambo District of the Eastern Cape has reported a significant number of abductions. An empirical survey conducted under the auspices of the Committee in 2013 found that organisations dealing directly with *ukuthwala* girl victims concurred that *ukuthwala* is most widely practised in areas

like Ixopo, Bergville, Umzimkhulu and the Eastern Cape. These organisations operate at national level but are not based only in these two provinces.

3.10 This focus does not imply or suggest prioritising these provinces; neither do we attempt to provide an exhaustive list of cases in these two provinces. Reference is made to cases dating back to the year 2000, which reflects that although *ukuthwala* is an old custom, the practice continues to the present day.

3.11 There are a number of reports of incidents in which girls traveling to school by foot were accosted by a man or group of men who overpowered and abducted her. This has happened mostly in KwaZulu-Natal and the Eastern Cape, where girl children between the ages of 11 and 18 have been abducted and compelled to marry boys or men under the pretence of the customary practice of *ukuthwala* (CGE). Consequently, the girl's family would be approached to accept the marriage of their daughter – accompanied with a payment of damages.

3.12 The practice has manifested elsewhere. A recent case that is still in the courts has been referred to by Bianca Capazorio as “one of the first cases of ‘*ukuthwala*’ to be brought to court in the Western Cape”.¹⁹ On 4 February 2012, Mvumeleni Jezile of the Western Cape had six charges put against him, ranging from human trafficking to rape. The state sought the minimum sentence of life imprisonment on his three rape charges. On 28 January 2014, Jade Otto reported on the case in the *Cape Argus* in an article entitled “Girl, 14, tried to escape ‘husband’ twice”; Otto dubbed Jezile a “human trafficker”. Jezile was convicted and awaits sentencing following the girl's ordeal, which started in February 2010 when she was kidnapped from her home in Ngcobo in the Eastern Cape and forced to marry Jezile, who was aged 30 at the time.

3.13 The practice has also been reported in Bergville and Greytown, with some mothers of children in Bergville supporting the practice fully. Incidents of three girls dropping out of school as a result of *ukuthwala* were reported at Nsetheni area in Bergville.

3.14 The *City Press* (28 August 2011) in an article titled “Waging war against criminal element of *ukuthwala* practice” reported the conviction of three men in Lusikisiki in the Eastern Cape. They were sentenced by the Lusikisiki Regional Magistrate's Court to a total of 16 years.

¹⁹ Capazorio B, “Man ‘kidnapped, forced girl to marry him’” (http://www.iol.co.za/news/crime-courts/man-kidnapped-forced-girl-to-marry-him-1.1227492#.UzFGK_mnolQ) site assessed 21 November 2012.

3.15 In Umzimkhulu, an *induna* reported a matter to the local SAPS on 1 October 2011. A discussion was held later that day with the two families about the disadvantages of *ukuthwala* for an underage girl. The child was ultimately placed at Sacred Heart Child and Youth Care Centre and she is continuing with her education.

3.16 In 2012 a case was reported to a pastor of the Shembe church. The CGE received information from a community member in Maphumulo about a 14-year-old girl child who was to be married to a member of the Shembe church, as a replacement for her sister who had been earmarked for marriage but had fallen pregnant. In 2013, the KZN-based newspaper *Ilanga* reported the case of a 13-year-old girl who was to be married in January 2013 to a 41-year-old Shembe church member, with the approval of the girl's father.

E Nature and scope of the problem

3.17 During 2009 it was reported that the age-old tradition of *ukuthwala*, which had apparently died out, was re-emerging in certain parts of the country.²⁰ Various media reports in 2009 revealed that:²¹

- The SABC had unearthed 100 cases of young girls being forced into unions with older men;

²⁰ However, as early as 2005 Girls Net had made a submission to the NCOP Chairperson of Select Committee on Social Services, Ms Masilo, urging Parliament to effect an amendment to clause 12 of the Children's Bill (now section 12 of the Children's Act of 2005) by adding a provision criminalising forced marriages. The concern raised by this organisation was that although clause 12 provided that every child (a) below the minimum age set by law for a valid marriage has the right not to be given out in marriage or engagement, and (b) above that minimum age has the right not to be given to marriage or engagement without his [or her] consent, it was not clear what the minimum age set by law is. The submission also observed that the Marriage Act and the Recognition of Customary Marriages Act do not refer to the minimum age for marriage. One conclusion was that the minimum age referred to in this clause was provided for by the common law, namely the age of 12 years for girls and 14 years for boys (a view confirmed by the UCT Children's Institute in the Discussion Paper on Virginity Testing and the Children's Bill at p 3). Girls Net strongly argued that girls above the minimum age must agree to the marriage and that the decision should not be left solely to the parents. They noted that the Marriage Act provides that a girl aged between 15 and 18 years can be married but needs the consent of her parents. They interpreted the provision to mean that if a girl between the ages of 15 and 21 does not want to get married, she cannot be compelled to do so by her parents.

²¹ See *City Press* 24/01/2009 "Ripping the veil off 'ukuthwala'"; *Weekend Post Online* 2009/04/17 "School girls being forced into early marriage in T'kei"; *Daily Sun* 13/03/2009 "Young Girls must flee *ukuthwala*"; *Dispatch Online* 2009/04/13 "King bans forced marriages"; *The Star* 2009 June 3 "Girls sold for lobola"; *Sowetan* 10 July 2009 "Girls as young as 13 forced into marriage"; *TimesLive* 10 December 2009 "Forced Marriage in SA".

- Roughly 20 school girls were being forced to drop out of school every month as a result of *ukuthwala* (forced marriage);
- The practice had taken on another dimension in that girls as young as 12 years were sometimes forced to marry men aged 40 or older, some of whom were HIV positive;
- In some cases the abduction of a girl took place with the consent and knowledge of her parents or guardian, and might even be orchestrated by those adults if they were in dire economic straits and were tempted by *lobolo* offered by the prospective husband;
- In some instances, a girl was kidnapped by relatives of the prospective husband and taken to his home;
- The parents of the girls rarely reported these “abductions” to the police for fear of reprisals, ridicule or being shunned by community members;
- In some cases, when they did report the matter to the authorities, they were told *ukuthwala* is a cultural issue;
- In most cases the girls who are abducted are verbally, sexually and physically abused by their “husbands” and their families.

3.18 Evidently, the question raised by such reports, and the element of *ukuthwala* that is found to be distasteful and unacceptable to many people, is where the free and full consent of the intended bride is lacking, and where coercion is used either by family members or any other person, including the prospective husband, to induce “consent” to the proposed marriage. As stated in paragraph 3.4 above, this form of *ukuthwala* is tantamount to a forced marriage. Where *ukuthwala* affects a girl child, it also constitutes a “child marriage” or “early marriage”, which is another type of forced marriage. It is these corollaries or features of the practice of *ukuthwala* in contemporary South African society that the SALRC has been asked to investigate and make proposals on for law reform. Such proposals should ensure effective access to justice for potential and actual victims of this practice. Although forced and child marriages can affect both men and women, these practices have specific detrimental consequences for girl children physically, developmentally, psychologically and socially.²² The SALRC is aware that girls or

²² One such consequence is early pregnancy and early child-bearing, which may entail complications during pregnancy and delivery, and could pose great risk of maternal mortality and morbidity. Other problematic consequences include vulnerability to HIV/AIDS; early termination of the girl’s schooling; and lack of personal independence, which could increase her vulnerability to abuse and acute poverty. It is a huge responsibility for a young girl to become a mother and a wife and these roles impact negatively on a girl’s psychological development and perception of herself. See Child Marriage and Forced Marriage at <http://www.forwarduk.org.uk/key-issues/child-marriage> (accessed 30 March 2010).

women of all ages may become victims of forced marriages, and that it might be necessary to fashion the final recommendations for law reform in a manner that takes this reality into account.

3.19 A cursory glance at some of the reports also reveals that the rationale for *ukuthwala* has changed. Today, poverty seems to be a critical factor that has contributed to the resurgence of the custom. The reports that abductions of young girls may take place with the consent and knowledge of the girls' parents or guardians – and indeed that in many instances an abduction is orchestrated by parents or guardians who are in dire economic straits and are tempted by the *lobola* offered by the prospective husband – bolster this conclusion. There are, of course, other factors that have fuelled this practice, such as the belief that having sexual intercourse with a virgin cures HIV/AIDS infection; and traditional attitudes in which women are regarded as being subordinate to men or as having stereotyped roles. Research by the Commission for Gender Equality in KwaZulu-Natal,²³ the results of which were published in 2009, confirmed that motives for the practice have changed and that the practice has detrimental consequences for women. The same study revealed that:

- Whereas the practice was originally intended to culminate in the marriage of an abducted girl, it is now carried out by vagrant and loitering men who just want to satisfy their lust.
- Girls are abducted and forced into unions with older men they do not know or like.
- This practice renders girls susceptible to diseases such as cervical cancer and other sexual reproductive complications, and increases their vulnerability to depression and hypertension.

F Responses to the revival of the custom

3.20 The resurfacing of the practice of *ukuthwala* has been condemned and severely criticised by government, traditional leaders and members of civil society. Such criticism alleges, among other things, that when children are targeted the practice –

²³ The Report of the Gender Commission on Traditional Practices and the Constitution: Policy Dialogue Implications for Human Rights and Gender Equality, KwaZulu-Natal 4 November 2009.

- is contrary to the Constitution;
- violates the right to freedom of choice and the right to education;
- constitutes statutory rape;
- exposes children to sexually transmitted infections;
- forces children to take on social responsibilities, such as parenthood, for which they are ill-prepared.

3.21 Joint initiatives by government and other stakeholders, aimed at completely eradicating the practice of *ukuthwala*, have been implemented. Recent developments in this line include:

- An *imbizo* in Lusikisiki on 24 March 2009 by the then Minister in the Presidency, Dr Manto Tshabalala-Msimang, on girl child abductions, forced and early marriages. Dr Tshabalala-Msimang stressed that it is a myth that if an HIV-positive man sleeps with a young virgin he will be cured of the infection.
- A visit by the then Minister in the Presidency accompanied by other government officials to Qaukeni Great Palace and Pharmaton Hostel, a place of refuge used by girls escaping abductions. The then Minister in the Presidency addressed the community on this issue on 6 April 2009.
- A pledge entered into with the Traditional Leaders in Flagstaff and Lusikisiki on 20 April 2009.²⁴
- An announcement by King Sigcau during Dr Tshabalala-Msimang's visit that he would ban the practice of *ukuthwala* in Eastern Pondoland.
- A seminar on *ukuthwala* and its impact on women and children organised by the SA Human Rights Commission in collaboration with the Commission for Gender Equality, held on 17 August 2009 in Mthatha Garden Court.
- A visit by the Minister of Women, Children and People with Disabilities, Ms Noluthando Mayende-Sibiya to Qaukeni Great Palace in Lusikisiki on 26 June 2009.
- A call by the Minister of Police, Mr Nathi Mthethwa, to arrest mothers and fathers who force a girl child to marry a man unknown to the child.

²⁴ Address by Dr Manto Tshabalala-Msimang to the National Gender Machinery, Commission on the Status of Women, report-back meeting on 4 May 2009 available at <http://www.info.gov.za/speeches/2009/0905041351001.htm> (accessed 11 May 2010).

- In 2010 the Minister of Justice and Constitutional Development, Mr Jeff Radebe, urged the National Prosecuting Authority to take a tough stand on forced marriages.²⁵
- Certain traditional leaders have been at the forefront, wanting to see criminal cases prosecuted and accompanying Chapter 9 Institutions (such as CGE) to community meetings.
- A police task force has been set up in Bergville District to investigate *ukuthwala*, after a series of reported abductions there.
- Public campaigns and educational reports have raised the awareness among NGOs, state actors and other bodies of cases of *ukuthwala* in “hot-spot” areas. For instance, the Committee learnt of a report that listed the names of impending girl abductees, who were said to be earmarked for kidnapping by men who hailed from Umzimkhulu and were working in Johannesburg and due to return to their rural homes in Ematsheni and St Paul for the holidays.
- In the Shembe church case cited above, social workers from the Department of Social Development obtained an order granted by a magistrate of the Children’s Court in Maphumulo, authorising the removal of the child to a place of safety.
- KZN has an *Ukuthwala* Provincial Task Team which is coordinated by the Office on the Rights of the Child (ORC). The establishment of the Task Team was recommended by the Kwazulu-Natal Provincial Advisory Council for Children (KPACC), which is provincial machinery that promotes respect for the rights of children. Capacity building led by the Office of the Premier should be ongoing. Capacity building and awareness raising are already being conducted at Bergville, Loskop, Zwelibomvu, Harding, Vulindlela and Jozini.

G Responses to the practice of *ukuthwala*

3.22 This section draws on data from the 2013 survey conducted by the Committee as well as state-related responses. Various individuals and institutions concerned about the *ukuthwala* scourge (where there is no consent and related human rights violations occur) have made

²⁵ See *Timeslive* 3 May 2010 “Act on forced marriages, says Radebe” available at <http://www.timeslive.co.za/local/article431089.ece/Act-on-forced-marriages-says-Radebe> (accessed 20 May 2010).

efforts to combat the practice. Anecdotal evidence indicates that *ukuthwala* is being practised on girls as young as 11 years of age, and that “consent” is procured by force, fear and violence. There is concern that the practice has contributed towards drop-out from schooling as well as pregnancies among girls, and negative health impacts. Another source of concern is the low number of cases that are reported, investigated and successfully prosecuted, despite evidence of the widespread practice of *ukuthwala* in certain communities. The CGE is of the view that the South African government should be prevailed upon to take the necessary measures to ensure its various departments address these serious contraventions. Having been made aware of the existence of *ukuthwala* and/or forced marriage cases, the CGE has intervened in some instances where this was possible by approaching the girl’s family and seeking the intervention of the SAPS and the Department of Social Development.

3.23 With regard to the Shembe church incident, the CGE invited the National Prosecuting Authority (NPA) to a meeting on 25 January 2013 in Ozwathini. The NPA was invited to attend as a key stakeholder in ensuring the protection of the rights of the girl child and the enforcement of South African legislation in this regard.

3.24 Organisations and state actors that work with abducted girls have listed the following factors as elements that ought to be considered, first in an attempt to curb the practice and second to offer support to the victims:

- Establish educational campaigns in conjunction with local community organizations or activists;
- Institute a support system that is able to draw on a network of helpers;
- Report cases to all state actors including the Department of Social Development and the SAPS;
- Relevant departments should gather statistics on *ukuthwala*. Research on the practice must be undertaken to assess its true extent.

3.25 Some of the complaints and possibilities listed by these organisations include:

- Police take too long to prosecute;

- State actors ought to act much more decisively. For instance, the NPA has the requisite powers to open a charge without parental consent and to charge the parents if they are obstructing justice.

CHAPTER 4

PUBLIC CONSULTATIONS

A Introduction

This chapter draws from written submissions as well as face-to-face consultative meetings that were held throughout the country between November, 2014 and January 2015. Various individuals and governmental and non-governmental organisations participated in this process. Emanating from all written submissions and consultations, there was wide consensus that the practice of *ukuthwala* in its current form is distorted, with the introduction of many negative elements. Further, there was agreement that some form of intervention is necessary, as the status quo is unacceptable. However, despite the general agreement, there also exist various views and varying levels of regard for the practice.

B Views on *Ukuthwala*

Some of the views are significantly divergent, reflecting the following threads of thought:

- a) **Groups supporting *ukuthwala*** are sometimes nostalgic about the practice:
 - They regard it as an event leading to marriage as in instances where girls arranged to be abducted so that families who disapproved of the boyfriend would be forced to allow the marriage,
 - They acknowledge and understand that culture evolves; they are also aware of the inherent distortions within the practice,

- They maintain that *ukuthwala* is different from bride abduction. Some participants at the Pietermaritzburg consultative meeting asserted that the indigenous version of *ukuthwala*, unlike the act of abduction, is appropriate and acceptable.
- They believe that *amakhosi*, as custodians of customary law, need to be rigorously inducted into an understanding of the constitutional elements that are violated in the current practice. The Pietermaritzburg meeting also raised the issue of strengthening traditional governance, especially the Traditional Courts, which would play a crucial role in ensuring compliance with the law and the Constitution.

b) **Groups opposed to the practice** regard it as abuse of women. In a written submission, Dr JL Matthee and Professors C Rautenbach, WJ du Plessis & D du Plessis of North-West University argue that the practice is 'a violation of a minor girl's fundamental human rights under the guise of *ukuthwala*, and should not be justified'.

Views held by these academics stem from reported cases of abductions and kidnappings of women and girl children in the name of *ukuthwala*, many of which are cases that they have to oversee as well as provide support towards. In opposing the practice they highlight the need to take cognizance of;

- elements of criminality often associated with the practice,
- negative impact on health and physiological development of women,
- child mortality resulting from trauma of abduction.

It is on bases such as these that the Commission on Gender Equality supports the enactment of new legislation that would 'address the unlawful elements and consequences of *ukuthwala*'.

Within the group opposing the practice there were stern views expressed. For example, in a written submission Ambrose Mfayela argued that *ukuthwala* has no place in our constitutional democracy, and consequently advocated a total ban of the custom. However, other opponents of *ukuthwala* conceded that the Constitution of the Republic of South Africa is equally protective of cultural rights, thus opening the door to a debate on the apparent contradiction between culture and individual rights.

It is on the basis of such perceptions of contradictions within the Constitution that two organs of state – the Commission on Gender Equality (CGE) and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights

Commission) – at the Centurion consultative meeting were called upon to find common ground and provide unambiguous guidance. This perception of contradiction emerged in a slightly different form in a written submission by Dr Makho Nkosi and Professor MT Buthelezi of the University of KwaZulu-Natal who argue for ‘zero tolerance of the abduction of girls’, while simultaneously suggesting that ‘the cultural practice of *ukuthwala* as a custom among the Zulus be accommodated, and that those people who want to practice it be respected in their choice’.

Finally, there was a view expressed that the concerns related to forced marriages need to be broadened to include other forms of coercion and practices not limited to *ukuthwala*, arguing that legislation that deliberately singles out *ukuthwala* could be viewed as selective.

c) Groups that see *ukuthwala* as distortion of a cultural practice

Flowing from the general agreement that the current mode of the practice is not *ukuthwala*, some participants at the consultative workshops were at pains to explain the difference between *ukuthwala* and abduction. They view the contemporary trend in South Africa, in the name of *ukuthwala*, as abduction, pointing out the following negative elements in particular:

- **Lack of consent by the woman:** consent of a woman was an important part of *ukuthwala*, either before or during the process of *ukuthwala*. In fact some people argued that when *ukuthwala* took place before the woman’s consent, and she subsequently refuses to accept the love of the man, a fine (*ukuthwala* beast) was paid to her family. Accordingly, to NQ Mabeka it is of utmost importance to ‘conform to the provision of Section 3 of the Recognition of Customary Marriages Act, in other words; the woman concerned must give express consent to such marriage and if she does not do so she should not be abducted or *thwalaed* at all’. Along the same lines, the Centre for Child Law submits that, ‘while the Recognition of Customary Marriages Act and the Marriage Act make it possible for children to get married, where all the other requirements are complied with, South Africa should be heeding the international call for the age of marriage to be set at eighteen years without exceptions’. According to the Centre such compliance will categorically outlaw child marriages.
- **Rape:** Within the appropriate indigenous *ukuthwala* practice, sex was prohibited. Evidence of sex led to a fine against man, even if he were to argue that there was consent.

- **Drugs:** The practice of coercing abductees to take some form of medicine in order to induce them to 'love' someone they did not intend to love was referred to. This is also unacceptable: the process of handing the woman over to the women in the family of the interested man was for her to be safe while word of her whereabouts is sent to her family.
- **Violating human rights:** Other participants lamented the fact that what is described is grossly at odds with human rights as encapsulated in the Constitution.

C Stakeholders' views on possible interventions

There was complete consensus that, in order to deal with the human rights and social ills associated with current versions of *ukuthwala*, various kinds of intervention need to be taken, though views differed as to what form the interventions should take. The suggestions included the adoption of the following:

Legislative measures -

- new measures; or
- strengthening existing measures

Non-legislative measures

a) Legislative measures were viewed as an important intervention strategy. Some participants, like the Gauteng consultative meeting group suggested that these required the creation of a law against *ukuthwala* or those elements of *ukuthwala* that are negative. Others suggested that there are sufficient legal instruments in existence and that these needed to be strengthened for instance to enforce provisions about consent and marriageable age, Mkhuseleli Jokani's written submission, whilst acknowledging the gross nature of the current practice, asserted that 'South Africa does not need a specific legislation to deal with the practice of *ukuthwala*. The common law has proven as well as other statutory provisions that deal with the conduct arising from the *ukuthwala* practice are enough to adequately respond to the problem'.

On the other hand there were many proponents of the enactment of new legislative measures as an intervention strategy. Prominent in this category were the South African Catholic Bishops' Conference Parliamentary Liaison Office (SACBC) and the South African Police Services (SAPS). These organisations supported the development of a new statute which would criminalise distorted *ukuthwala*, arguing that the current legislation dealing with customary marriages does not address issues of age and consent. In particular, the SACBC supports the view of the NPA - that criminal charges should be extended to parents who agree to their under-age children being forcibly married.

They motivate their preference for a new law in the following way:

- The extent of the problem and its conflict with the Constitution warrant the enactment of a stand-alone statute.
 - The seriousness of problems associated with *ukuthwala* (such as abduction, rape, forced marriage, conduct of guardians) is of such a magnitude that a clear law is necessary.
 - Stakeholders will not do what they are supposed to do to curb the practice or deal appropriately with victims unless these duties are outlined in law. This view supported the extension of a new law to cover the enforcement of social interventions and dealing with victims, including for instance the responsibilities of agents such as SAPS, the Department of Justice and Constitutional Development and Department of Co-operative Governance and Traditional Affairs.
- b) Non-legislative interventions (which include education programmes, awareness workshops, and media campaigns) tended to be motivated on the following grounds:
- There is a need to engage communities at the local level, about the aberrations of culture and about the human rights of women and children. One participant in the Eastern Cape quibbled with the neutrality of the term “partner” in reference to abductions saying this happened specifically to women. However, there is also recognition that while deploying the energies of civil society to engaging communities on all practices that are harmful and involve force towards children, both sexes would have to be considered though with emphasis on the current plight of girl children and women,

- Some participants emphasised the need to revive a good relationship with local structures of authority and leadership. This was in particular reference to traditional leadership in some instances; but mention of faith-based organisations, traditional healers and community-based organisations was also made,
- Women and girls must be empowered with knowledge, so that they know their rights. In particular schools must be involved in engaging young girls about their rights, the importance of education, and the illegal nature of current *ukuthwala* practices so that they can seek appropriate assistance if at risk,
- Concerns were raised that the legal route may sometimes not take into account the nuances of culture, such as a family that fines a man for *ukuthwala* where a woman did not accept love of the man, or a man that is fined for sex with a woman. Such complexities are not readily understood in traditional communities and need to be explained.
- Some of the institutions that should spearhead non-legal interventions were identified and listed as follows:
 - Department of Basic Education;
 - Department of Justice and Constitutional Development;
 - Department of Social Development;
 - Department of Health
 - South African Police Services
 - Non-governmental Organizations
 - Interfaith organisations;
 - media
 - community leaders;
 - special welfare organisations

CHAPTER 5

THE LEGAL FRAMEWORK

A Introduction

5.1 Since the publication in 2009 of the Tshabalala-Msimang Report²⁶ on the abuse of the practice of *ukuthwala* in certain parts of the Eastern Cape, the custom has attracted a great deal of attention from academic commentators.²⁷ From a perusal of the legal sources it would seem that some practices associated with *ukuthwala* are illegal as they are inconsistent with the values enshrined in the Bill of Rights and international conventions to which South Africa has either acceded or has ratified.

5.2 The customary practice of *ukuthwala* has many names.²⁸ It should be stated from the outset that not all forms of *ukuthwala* are objectionable or run contrary to a community's perception of justice or the legal convictions of society, and therefore not all forms are unlawful.²⁹ Where a young woman who has attained the minimum age for marriage (as

²⁶ See the address by the former Minister in the Presidency, the Honourable Dr Manto Tshabalala-Msimang, to the National Gender Machinery, Commission on the Status of Women, report-back meeting on 4 May 2009. Available at <http://www.info.gov.ZA/speeches/2009/0905041351001.htm>

²⁷ These include: Lea Mwambene and Julia Sloth-Niesen "Benign Accommodation? *Ukuthwala* 'forced marriage' and South African Children's Act" 2011 (21) *Journal of Family Law and Practice* 5; David McQuoid Mason "The Practice of '*Ukuthwala*', the Constitution and the Criminal Law (Sexual Offences and Related Matters) Amendment Act" 2009 (3) *Obiter* 716; MJ Maluleke "Culture, Tradition, Custom, Law and Gender Equality" 2012 *PER* 428; and Oosthuyzen and Ngema "*Ukuthwala*: Structured for Relevance" 2010 *Speculum Juris* 84.

²⁸ A study by the Department of Cooperative Governance and Traditional Affairs showed that the practice is not confined to the Nguni-speaking nations of the Eastern Cape and KwaZulu-Natal, as initially assumed; variants of it are found among most indigenous communities in South Africa. See "Draft Discussion Document on *Ukuthwala* in South Africa" compiled by the Department of Cooperative Governance and Traditional Affairs, at 9.

²⁹ CR Snyman, in *Criminal Law* (2008) at 98, puts forward a strong argument that giving meaning to this concept requires a human rights-centred approach. Snyman writes: "The contents of the Bill in Chapter 2 of the Constitution

prescribed in the Recognition of Customary Marriages Act³⁰) agrees to *ukuthwala* by her lover and she is not subjected to any form of duress, the conduct of her boyfriend would be lawful.³¹

5.3 It seems clear, from the newspaper reports and anecdotes about women and young girls who have been threatened with or affected by this practice, that what is impugned and found distasteful are those forms of *ukuthwala* that affect girl children or involve coercion. There is consensus that *ukuthwala* itself is not marriage but a prelude to marriage. However, this distinction becomes tenuous in circumstances where a person is abducted despite her *bona fide* resistance; where *ilobolo* (however negligible) is paid; and where the abducted person is forced to perform the chores of an *umakoti* (young bride). In these circumstances, *ukuthwala* would be tantamount to a “forced marriage”. And if the victim is a child below the age of 18, it would amount to a “child marriage”.

5.4 The question to be asked is whether the current legal framework provides adequate protection from and redress against those forms of *ukuthwala* (or corollaries of it) alluded to in the preceding paragraph. The assessment prompted by this question will hopefully shed light on the following issues:

- Whether there is a need for new legislation to combat the harmful effects of distortions carried in the name of *ukuthwala*;
- What form such law should take (for example criminal offence, civil legislation, or amendments to existing legislation); and
- How the provisions of such a law might be formulated.

must play an important role in deciding whether conduct is in conflict with public policy or the community’s perception of justice and therefore unlawful. The values reflected in the Constitution such as ‘human dignity’, the achievement of equality and the advancement of human rights, and freedoms are of crucial importance.” This view is consistent with the approach advocated by Chief Justice Ngcobo in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 148, where the judge stated “Our Constitution recognises indigenous law as part of our law. Thus s 211(3) enjoins courts to ‘apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’. The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bills of Rights. While in the past indigenous law was seen through the common-law lens, it must now be seen as part of our law and must be considered on its own terms and ‘not through the prism of the common law’ (at 163). As with all laws, indigenous law now derives its force from the Constitution. Its validity must now be determined by reference not to common law but to the Constitution.

³⁰ 120 of 1998. This aspect is discussed in detail below.

³¹ This would be the case if the woman concerned, prior to being abducted, gives her consent voluntarily and without coercion, and understands the elements of the practice and appreciates its consequences. For a discussion of consent as a ground of justification in criminal offences, see Snyman *Criminal Law* (2008) 123-129.

5.5 The legal position will be considered under the following headings in this chapter, in the order shown here:

- (a) the Constitution
- (b) International conventions
- (c) Domestic law

B Legal framework

1 The Constitution

(a) General

5.6 As stated earlier, *ukuthwala* is unlawful if it is contrary to the community's perception of justice or the legal convictions of society. The Bill of Rights in chapter 2 of the Constitution plays an important role in deciding whether conduct is contrary to public policy or the community's sense of justice and is therefore unlawful. The values reflected in the Constitution – such as human dignity, the achievement of equality, and the advancement of human rights and freedoms – are crucial in deciding this issue. It is therefore imperative to review the practice of *ukuthwala* and all its consequences, in particular forced marriages and child marriages and the violence which has come to characterise this practice, in light of the Constitution as the supreme law of the Republic.³²

(b) Balancing competing rights

5.7 On the one hand, the Constitution recognises that South Africa is not an homogenous society. The Constitution guarantees persons who belong to a cultural community the right to

³² Section 2 of the Constitution unequivocally states that Constitution is the supreme law of the Republic, and that any law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. See for example the then Justice Ngcobo's minority decision in *Bhe and other v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 148, in which the judge emphasised that today, customary law enjoys the same status as other laws and that it derives its force from the Constitution. He added that the validity of the rules of customary law must be determined not with reference to the common law but to the Constitution.

enjoy their culture³³ and the right to participate in the cultural life of their choice.³⁴ However, neither of these rights may be exercised in a manner that is inconsistent with any provision of the Bill of Rights.

5.8 In relation to girl children, the Constitution considers everyone below the age of 18 years to be a child, and accords to this category of persons (with a few exceptions) the same rights as those granted to adults.³⁵ Some of these rights are:

- The right to equality,³⁶ which must be read in conjunction with the Promotion of Equality and Prevention of Unfair Discrimination Act.³⁷ This Act prohibits, among other things, customary practices that impair the dignity of women and undermine the dignity and wellbeing of girl children; the Act also prohibits sexual harassment.
- The right to human dignity.³⁸
- The right to freedom and security of the person, which includes the right to be free from all forms of violence.³⁹
- The right to education.⁴⁰

³³ Section 31 of the Constitution reads:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
- (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain a cultural, religious or linguistic associations and other organs of civil society
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with the any provision of the Bill of Rights.

³⁴ Section 30 of the Constitution provides that:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

³⁵ De Waal, Currie and Erasmus *Bill of Rights Handbook* (2001) 456.

³⁶ This relates to equality before the law, equal protection and benefit of the law. The violation arises from the fact that the abducted girls are often forced to leave school and made to enter into arranged marriages. In this way, they are treated differently from boys of their age.

³⁷ Act 4 of 2000.

³⁸ This arises from the fact that the victims of *ukuthwala* are often expected to submit to sexual acts with older men.

³⁹ This section covers a wide range of violations; see the discussion in McQuoid Mason in 2009 *Obiter*

⁴⁰ This arises from the fact that the young victims are often forced to leave school at an early age.

- The rights of children in section 28, which include the right to be protected from maltreatment, neglect, abuse and degradation; and the right not to be required or permitted to perform work or to provide services that are inappropriate for a person of that child's age, or which would place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development. Furthermore and most importantly, the Constitution enjoins everyone to take into account the child's best interests in every matter involving a child.⁴¹ The Children's Act elaborates what the principle of the "best interests of the child" entails, by providing (for example) that in matters concerning a child, the following factors must be taken into account: the child's age, maturity and stage of development; and the need to protect the child from any physical or psychological harm.⁴²

(c) *Evaluation of the practice in the light of constitutional provisions*

5.9 The right to enjoy one's culture has been thrown into competition with other rights and inevitably this has led to conflict. The Constitution gives no indication whether other rights supersede cultural rights; the fundamental rights are not ranked.⁴³ The SALRC has considered the interplay between individual rights and group rights in the Constitution, particularly with regard to children, and concluded that:

There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The Commission also accepts the importance of customary law and practices for a very large portion of our population. However, the Commission notes that customary law is recognised as a system of law provided it operates within the broad principles of the Constitution of 1996. Given the fact that the best interest of the child principle in section 28 is paramount and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of cultural or religious group.⁴⁴

⁴¹ Section 28(2) of the Constitution.

⁴² See section 7 of the Children's Act 38 of 2005.

⁴³ TW Bennett *Human Rights and African Customary Law* (1995) 28.

⁴⁴ Report of the South African Law Reform Commission on the Review of the Child Care Act (Project 110), December 2002 at 283.

5.10 The question therefore is whether *ukuthwala* as it is currently practised is at odds with any rights of the girl child as contained in the Constitution. Second, if it is found that the practice violates the rights of the girl child, the question arises whether such a violation is justifiable in terms of section 36 of the Constitution.⁴⁵ Undoubtedly, the direct consequences of the abuses of the *ukuthwala* custom, namely forced marriages, child marriages, violence against women and young girls, and a girl's dropping out from school constitute gross violations of the rights of women and girl children (referred to above). These violations can in no way be justified. The constitutional recognition of cultural diversity should not be used as an excuse for or to sanction the violation of the rights and liberties of women and children.

2 South Africa's obligations under international law

(a) General

5.11 The current versions of the practice of *ukuthwala* are challenged because they countenance, justify or sanction violence against women and girl children. South Africa has an obligation under international human rights law to ensure that all marriages, including customary marriages, are entered into with the free and full consent of the intending spouses; to ensure that harmful cultural and social practices prejudicial to the health, development, normal growth, welfare and dignity of children are abolished; and that harmful cultural practices affecting the rights of women are eliminated.⁴⁶

⁴⁵ Section 36(1) of the Constitution provides that the rights in the Bill of Rights may only be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

⁴⁶ This inference is based on an assessment of numerous international conventions to which South Africa has either acceded or has ratified. The Department of International Relations and Cooperation has confirmed in an email to the SALRC researcher that South Africa signed the Convention on Consent to Marriage, Minimum Age for Marriage (1962) on 1962 12 10; South Africa acceded on 1993 01 29 and the convention entered into force on 1993 04 02. The Covenant on Economic, Social and Cultural Rights (1966) was signed on 1966 12 16 and South Africa became a signatory on 1994 10 03, but since then nothing further has happened (i.e. accession or ratification). The Convention on the Elimination of All Forms of Discrimination Against Women (1979) was signed on 1979 12 18 and South Africa became a signatory on 1993 01 29, and the convention was ratified on 1995 12 15.

(b) State obligations

5.12 Obligations of the state are as follows:

- Article 16(2) of the Universal Declaration of Human Rights (1948) declares that *marriage shall be entered into only with the free and full consent of the intending spouses.*
- The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962) prohibits marriages that are not entered into with the full and free consent of both parties, and requires that such *consent should be expressed by the prospective spouses in person.* This Convention obliges state parties to take legislative action to *specify the minimum age for marriage.* Furthermore, it states that *no marriage should be entered into by any person below the minimum age,* except where a competent authority has granted a dispensation on age, in the interests of the intending spouses and for serious reasons.⁴⁷
- In 1954, the United Nations General Assembly adopted a resolution calling on all states to abolish customs and practices that are inconsistent with the Universal Declaration of Human Rights, by ensuring complete freedom in the choice of spouse, by eliminating completely child marriages and the betrothal of young girls before the age of puberty, and by establishing appropriate penalties where necessary.⁴⁸
- The International Covenant on Economic, Social and Cultural Rights (1966) states in article 10(2) that marriage must be entered into with the full and free consent of the intending spouses. In its General Comment 14, the Committee on Economic, Social and Cultural Rights noted that states are under a specific legal obligation to adopt effective and appropriate measures to *abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage.*
- Article 16(1)(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) is particularly relevant as it calls upon state parties to take all appropriate measures to eliminate discrimination against women in all matters

⁴⁷ Articles 1 and 2 of the Convention of Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

⁴⁸ Quoted in the Preamble to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, available at <http://www.unhcr.org/refworld/pdfid/456d89064.pdf> (accessed 11 May 2010).

relating to marriage and family relations; and in particular to ensure, on the basis of equality between men and women, that men and women have the same right to choose a spouse and to enter into a marriage with free and full consent. Article 16(2) provides that the marriage of a child shall have no legal effect and that all necessary action, including legislation, shall be taken to specify the minimum age for marriage.

- The Committee on the Elimination of Discrimination Against Women recommends that state parties take effective legal measures, including penal sanctions, civil remedies and compensatory provisions, to protect women against all forms of violence.
- The Convention on the Rights of the Child (1989) requires state parties to take effective and appropriate measures to abolish traditional practices prejudicial to the health of children. The Committee on the Rights of a Child urges state parties to develop and implement legislation aimed at changing the prevailing attitudes and addressing gender roles and stereotypes that contribute to harmful traditional practices so as to protect adolescents from all harmful traditional practices, such as early marriage. The same committee also urged state parties to increase the minimum age for marriage, with or without consent, to 18 years for both girls and boys.

5.13 In 2008, the Special Court for Sierra Leone recognised forced marriages as a crime against humanity under international law. In *The Prosecutor vs Alex Tamba Brima* the Appeals Chamber defined forced marriage as follows:

... a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threats of force or coercion to serve as a conjugal partner resulting in severe suffering, or physical or psychological injury to the victim.⁴⁹

5.14 The international legal framework sketched above has been augmented by regional legal framework. In the African continent, the following instruments are particularly important:⁵⁰

⁴⁹ *The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused) (Sentencing Judgment)*, SCSL-2004-16-T, Special Court for Sierra Leone, 19 July 2007. Available at <http://www.unhcr.org/refworld/category,LEGAL,SCSL,467fba742,0.html>.

⁵⁰These conventions have been ratified by South Africa. See <http://www.dfa.gov.za/foreign/multilateral1123.rtf> (accessed 11 May 2010).

- The African Charter on the Rights and Welfare of the Child (1990), which obliges all state parties to take all necessary appropriate measures to *eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child*, as well as to prohibit child marriage through legislation and take action to specify the minimum of marriage as 18 years.
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) requires state parties to take all necessary legislative and other measures to *eliminate all forms of harmful practices which negatively affect human rights of women*. The Protocol also requires state parties to enact appropriate national legislative measure to guarantee that no marriage takes place without the consent of both parties, and that the minimum age of marriage for women is 18 years.
- The African Youth Charter (2006) also requires state parties to take all appropriate steps to eliminate harmful social and cultural practices that affect the dignity and welfare of youth.

5.15 South Africa has a duty to ensure that customary practices which result in forced marriages and child marriages are abolished, and that laws are put in place to ensure access to justice for victims of these practices. Failure to do so is likely to be interpreted as a dereliction of the obligation imposed on South Africa by these international human rights instruments.

(c) Guiding principles for legislation on violence against women

5.16 The United Nations has developed guidelines which can be used by state parties to assess the development and implementation of legislation aimed at eradicating violence against women and girl children. Countries are urged to adopt a comprehensive human rights-based legislative approach to all forms of violence against women, which would encompass not only criminalisation and the effective punishment of perpetrators, but also the prevention of violence; the empowerment, support and protection of survivors; and the creation of mechanisms to ensure effective implementation of legislation.⁵¹ The UN has also recommended that:

⁵¹ United Nations Report of the Expert Group Meeting on Good Practices in Legislation on Harmful Practices Against Women 26-29 May 2009 at 5. Available at http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Final%20report%20EGMGPLVAW.pdf.

- Comprehensive legislation on harmful practices be enacted, either as stand-alone legislation or within a set of more comprehensive legislation on violence against women;
- Legislation should mandate training for religious, customary, community and tribal leaders so as to promote human rights and denounce violence against women, including harmful practices;
- Legislation should mandate training for health officials and teachers;
- Legislation should provide for effective sanctions against anyone who condones or participates in “harmful practices”, including persons listed above;
- Legislation should define “forced marriage” as any marriage entered into without the free and full consent of both parties;
- Legislation should set the minimum age for marriage as 18 for both males and females, should prohibit marriage before the age of 18;
- Legislation should define “child marriage” as any marriage entered into before the age of 18;
- Legislation should create a specific offence of forced marriage;
- Legislation should create a specific offence of child marriage;
- Legislation should criminalise the conduct of people involved in arranging or contracting towards a forced marriage or child marriage;
- Legislation should mandate that appropriate and specialised shelter services be available for victims or survivors of harmful practices;
- Legislation should not allow the perpetrator to escape punishment through reaching an agreement with the family of the victim or survivor and providing them with payment;
- Legislation should require the creation and enforcement of a system of registration for birth, marriage, divorce and death, which would encompass customary marriage.

3 Domestic law

(a) *What is the law on customary marriages in South Africa?*

(i) *General*

5.17 In the Republic, customary marriages are regulated by national legislation that was enacted after the advent of constitutional dispensation, and by laws promulgated by the former Transkei, Bophuthatswana and Ciskei, and by KwaZulu and Natal.⁵² Whether or not the marriage laws enacted by these self-governing territories and independent states should continue to exist, despite the coming into operation of the Recognition of Customary Marriages Act, is an issue beyond the scope of this investigation; the SALRC does not wish to express any view in that regard.⁵³ The Children's Act, to the extent that it deals with the marriages entered into by children, will also be considered here. There are serious gaps in the legislation, particularly in national legislation, which could exacerbate the abuse of *ukuthwala*. The various laws listed in this paragraph are considered below.

(ii) *Recognition of Customary Marriages Act*

5.18 In view of the fact that *ukuthwala* is a prelude to a customary marriage and should eventually lead to such a marriage, the essentials of a valid customary marriage as set out in the Recognition of Customary Marriages Act must be complied with.

⁵² These legislative enactments emanating from the erstwhile TBVC states and former homelands are recognised by the Constitution. Item 2(1) and (2) of Schedule 6 of the Constitution provide that all law in force when the Constitution took effect continues in force until amended or repealed by a competent legislative body. In addition, it stipulates that these laws do not have a wider application, territorially or otherwise, than they had when the 1993 Constitution took effect.

⁵³ The SALRC, in its Report on the Review of the Marriage Act 25 of 1961 (Project 109 published May 2001), concurred with the Department of Home Affairs, and recommended the repeal of the marriage laws of Bophuthatswana, Ciskei and Transkei. The Department of Home Affairs recently published the draft Marriage Amendment Bill of 2009 (Notice 149 of 2009, *Government Gazette* 31864 of 13 February 2009). This Bill, if enacted, will give effect to the recommendations of the SALRC. The Codes have been repealed but the repealing provision has not yet come into operation.

Age and consent requirements

5.19 This Act clearly states that the parties to a customary marriage must be older than 18 years, and that they must both consent to the proposed customary marriage.⁵⁴ Furthermore, this Act contains a number of provisions aimed at making it possible for people under the age of 18 (that is, people below the minimum age set by this Act) to conclude a valid customary marriage. It draws a distinction between “minors” and persons below the age of 18. It states that if either of the prospective spouses is a “minor”, both of his or her parents – or if he or she has no parents then his or her legal guardian – must consent to the marriage. If the consent of the parents or guardian cannot be obtained, section 25 of the Marriage Act applies.⁵⁵ This section of the Marriage Act provides that the commissioner of child welfare may grant consent after an inquiry as to whether the marriage would be in the interest of the minor; and that if the parent, legal guardian or the commission refuse to give consent, the minor may approach the judge of the High Court. A marriage entered into contrary to these provisions is *voidable*.⁵⁶ The parent or guardian may approach the court before the minor attains majority and within six weeks of the date that the parent (or guardian) becomes aware of the existence of the marriage; or the minor herself can approach the court before she turns 18 years or within three months thereafter.

⁵⁴ Section 3(1) of the Recognition of Customary Marriages Act provides that:

For a customary marriage entered into after the commencement of this Act to be valid –

- (a) the prospective spouses
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law.

⁵⁵ Section 3(3)(a) and (b) of the Recognition of Customary Marriages Act reads:

- (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.
- (b) If the consent of the parent or legal guardian cannot be obtained ...

⁵⁶ Section 3(5) of the Recognition of Customary Marriages Act incorporates by reference the provisions of section 24A of the Marriage Act of 1961. Section 24A of the Marriage Act provides as follows:

24A Consequences and dissolution of marriage for want of consent of parents or guardian

- (1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-
 - (a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or
 - (b) by the minor before he attains majority or within three months thereafter.
- (2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors.

5.20 The provisions relating to persons under the age of 18 are couched differently. They authorise the Minister of Home Affairs or a person authorised by him or her to grant permission to a person under the age of 18 to marry, if such a marriage is desirable and in the interest of the prospective spouses.⁵⁷ This power may also be exercised *ex post facto*.⁵⁸ However, these provisions do not relieve the person who seeks Ministerial consent of the duty to additionally obtain consent from the parent or guardian.⁵⁹

Registration and determination of age

5.21 In addition to the requirement of consent, the Recognition of Customary Marriages Act contains a number of safeguards aimed at ensuring that the parties to customary marriages comply with the essentials set out in the Act. It states that the age of majority is determined by statute law and not by customary law;⁶⁰ requires customary marriages to be registered, although failure to register a marriage does not affect its validity;⁶¹ stipulates that in the case of a minor, the marriage officer may accept a birth certificate, identity document, or sworn statement as proof of that person's age;⁶² and states that if there is uncertainty with regard to the age of a person who is a minor, the registering officer may submit the matter to the magistrate's court, which must then establish the age of the person concerned.⁶³

Evaluation

5.22 First, it is noteworthy that this Act does not proscribe the marriage of people who have not attained majority. However, it complies with international instruments that require the minimum age for marriage to be set at 18 years for both men and women. Furthermore, the Act deals with the processes, arrangements or mechanisms that precede a customary marriage,

⁵⁷ Section 3(4)(a) of the Recognition of Customary Marriages Act.

⁵⁸ Section 3(4)(c) of the Recognition of Customary Marriages Act

⁵⁹ Section 3(4)(b) provides that: "Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the requirements prescribed by law."

⁶⁰ Section 9 of this Act is outdated, because it provides as follows: "Despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act 57 of 1972)." This has been changed by the Children's Act 38 of 2005, which sets the age of majority at 18.

⁶¹ Section 4(2) of the Customary Marriages Act requires customary marriages entered into before 15 December 2000, a date on which that Act came into operation, to be registered within twelve months. In respect of marriages entered into after the commencement of the Act, it requires that they be registered within three months.

⁶² Section 5(1) of the Customary Marriages Act.

⁶³ Section 5(2) of the Customary Marriages Act.

and understandably does not render non-compliance with its provisions a criminal offence. The provisions regarding minimum age are rendered nugatory by other provisions, which are discussed below.

5.23 Second, it is not clear why the legislature differentiates between “minors” and “persons who are under the age of 18 years”. It is significant that the involvement of the functionary of the State, namely the Minister or his or her delegate, is only required in respect of the latter category of persons, and the functionary may grant approval if the marriage is “*desirable and in the interest of the parties*”. Section 3(3)(a) of this Act is therefore conspicuous for not incorporating these requirements.

5.24 Third, the use of the term “minor” in this Act is problematic. It will be remembered that this is a common-law concept. Under common law, the minimum age at which a valid marriage can be concluded by a minor is 14 years for boys and 12 years for girls.⁶⁴ This gender-based discrepancy in the minimum age for marriage for boys and girls, which emanates from the use of the word “minor” in this Act, is inconsistent with the right to equality enshrined in the Constitution. Assuming that the interpretation of the term “minor” shown here is correct, this provision is inconsistent with the provisions of the Criminal Law (Sexual Offences) Amendment Act, which imply that the age of sexual consent in the Republic is 16.⁶⁵ It seems therefore that

⁶⁴ See JD Sinclair *The Law of Marriage Volume 1* (1996) 366.

⁶⁵ This inference is drawn from the provisions of section 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, read in conjunction with section 1(1)(b) which provides that a “child” in relation to these sections means a person 12 years or older but under the age of 16 years. Sections 15 and 16 of this Act read as follows:

15 Acts of consensual sexual penetration with certain children (statutory rape)

(1) A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

16 Acts of consensual sexual violation with certain children (statutory sexual assault)

(1) A person ('A') who commits an act of sexual violation with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions

there is a need to align this Act with the provisions of the Criminal Law (Sexual Offences) Amendment Act.

(iii) *Children's Act*⁶⁶

5.25 The Children's Act states that a "child" is anyone below the age of 18; and that in all matters affecting a child, the child's best interests and his or her involvement in decision-making are of paramount importance.⁶⁷

Cultural practices

5.26 First, this Act makes it clear that children should not be subjected to social, cultural and religious practices which are detrimental to their wellbeing.⁶⁸ However, non-compliance with this provision does not attract criminal liability. Second, it provides that a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and that a child above minimum age may not be given out in marriage or engagement without his or her consent.⁶⁹ Failure to adhere to this prohibition constitutes a criminal offence punishable by a fine or 10 years' imprisonment, or both, in the case of a first offender; and 20 years' imprisonment in the case of a second offender.⁷⁰

Care and protection of children, and trafficking in children

5.27 This Act makes provision for the removal of a child who has been exploited,⁷¹ or who lives in circumstances which may seriously harm that child's physical, social and mental

concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

⁶⁶ The Children's Act 38 of 2005 (Children's Act).

⁶⁷ Sections 9 and 10 of the Children's Act.

⁶⁸ Section 12(1) of the Children's Act.

⁶⁹ Section 12(2)(a) and (b) of the Children's Act.

⁷⁰ Section 305(1)(a),(6) and (7) of the Children's Act.

⁷¹ Section 1(1) provides as follows:

exploitation, in relation to a child, includes-

- (a) all forms slavery or practices similar to slavery including debt bondage or forced marriage;

wellbeing, to a place of safety.⁷² It also prohibits the trafficking⁷³ of children by anybody or any institution, including parents.⁷⁴ This Act places an obligation on frontline officials who come into contact with a child who is a victim of trafficking to report the matter to a social worker for investigation.⁷⁵

Evaluation

5.28 As stated above, section 12(1) of this Act makes provision for the right of children not to be subjected to cultural practices that detrimentally affect their wellbeing. It does not create a criminal offence but is a mere prohibition; however, it could lead to delictual liability.

5.29 Section 12(2)(a) prohibits giving out a child in marriage. A child who has been subjected to *ukuthwala* practice is not in any conventional sense of the word given out.⁷⁶ These provisions of the Children's Act which were aimed at preventing forced marriages and child marriages have been rendered nugatory by the lack of specificity. The legislature, in an effort to ensure that these provisions applied to all statutes regulating marriages in the Republic, decided not to specify the "minimum age" of marriage, which would have made it impossible for young children to contract a valid customary marriage even with their own consent or consent from their parents. In the context of customary marriage, the provisions of the Children's Act referred to above should be interpreted to mean that a girl below the age of 12 years and a boy below the age of 14 cannot conclude a marriage at all; and that a girl above the age of 12 and a boy

-
- (b) sexual exploitation;
 - (c) servitude;
 - (d) forced labour or services;
 - (e) child labour prohibited in terms of section 141; and
 - (f) the removal of body parts

⁷² Section 150(1)(e) and (f) of the Children's Act.

⁷³ Trafficking is widely defined to mean

- (a) means recruitment, sale, supply, transportation, transfer, harbouring, or receipt of children, within or across the borders of the Republic –
 - (i) by any means, including the use of threat, force, other forms of coercion, abduction, fraud, deception, abuse of power, or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child;
 - (ii) due to a position of vulnerability, for the purpose of exploitation...

⁷⁴ Sections 284 and 287.

⁷⁵ Section 288.

⁷⁶ Lea Mwambene and Julia Sloth-Nielsen "Benign Accommodation? *Ukuthwala*, forced marriage and the South African Children's Act" 20.

above the age of 14 should, in addition to the approval of a marriage by their parents, also consent to the proposed customary marriage. It has been argued above that a child is incapable of making an informed decision about the marriage partner or about the implications of marriage itself, and that the child's consent or consent granted on his or her behalf by adults should not be considered valid consent. The Children's Act effectively prohibits the customary marriage of a girl child below the age of 12 years, but sanctions the marriage of a girl child older than 12 but younger than 18 years, provided she consents. This provision is problematic as it does not contemporaneously require the involvement of an official of the state; nor does it require that such a marriage should be allowed if it would be in the interest of the girl child.

(iv) *The Codes of Zulu Law*

Consent requirements

5.30 In KwaZulu-Natal, the KwaZulu Act on the Code of Zulu Law⁷⁷ and Natal Code of Zulu Law⁷⁸ (the Codes) are still in force, and regulate customary and cognate unions.⁷⁹ In terms of the Codes, the consent of the father or guardian of the intended wife is necessary if the wife is a minor.⁸⁰ However, it is also imperative for the intended wife, irrespective of her age, to make a public declaration during the wedding ceremony that she is getting married of her own free will and consent.⁸¹

5.31 The Codes require the official witness to publicly ask the intended wife, at the wedding ceremony, whether of her free will and consent she is about to enter into a customary marriage with the intended husband. Should the woman decline to announce her consent, declare her

⁷⁷ KwaZulu Act on the Code of Zulu Law No 16 of 1985.

⁷⁸ Proclamation R151 1987, Natal Code of Zulu Law.

⁷⁹ Although the Codes have been repealed by section 53 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, the repeal has not yet come into force and the provisions of the Codes are therefore still in force.

⁸⁰ In terms of section 14 of the Codes, a person attained majority at the age of 21.

⁸¹ The relevant sections of the Codes read as follows:

38(1) The essentials of a customary marriage shall be-

(a) The consent of the father or guardian of the intended wife, if she is a minor, which consent may not be withheld unreasonably.

(c) a declaration in public by the intended wife to the official witness at the celebration of the marriage that the marriage is of her own free will and with her consent. [NB: In section 38(1)(a) of the KwaZulu Act on the Code of Zulu Law, the words "if she is a minor" have been omitted.]

dissent, or otherwise appear to be unwilling to proceed with the intended marriage, the official must immediately stop the proceedings, and if necessary take the woman into his or her protection and report the matter to the Commissioner or Magistrate.⁸² Furthermore, the intended marriage may be annulled by the court because of lack of consent.⁸³

5.32 The Codes require all customary marriages to be registered. However, failure to register a customary marriage does not affect its validity.⁸⁴

Forced marriage a criminal offence

5.33 Most importantly, the Codes make it a criminal offence for any family head or any person to coerce or attempt to coerce any girl or woman to enter into a marriage or cognate union against her will, to celebrate or permit the celebration of a customary marriage in the absence of an official witness, or to celebrate a marriage that the official witness has stopped. Any misconduct or breach of duty by the official witness is also criminalised.⁸⁵

Evaluation

5.34 The Codes are the only statutory enactments which expressly make it an offence to coerce a person into a marriage, and which require a public declaration by the *intended wife* that she is entering into a marriage freely and with her consent. However, the protection afforded by the Codes is limited to women and young girls residing in the Province of KwaZulu-Natal. The Codes do not address the plight of women and young girls threatened with *ukuthwala* in the rest of the Republic. In addition, the Codes have been repealed and these protective measures will cease to exist even in Kwa-Zulu Natal when the repeal takes effect.

(v) *Transkei Marriage Act*

5.35 This statute is outdated and does not contribute much to the issues under consideration, except that it requires the consent to a customary marriage of every party who has attained the

⁸² Section 42 of the Codes.

⁸³ Section 49(c) of the Codes.

⁸⁴ Section 45 of the Codes.

⁸⁵ Section 116(1)(a) and (b) and section 116(2) of the Codes.

age of 21 years, or the consent of the father or guardian of the party to such marriage if he or she has not attained the age of 21 years, for the marriage to be valid.⁸⁶

(b) Protection afforded by criminal law

(i) Common law and statutory offences

5.36 In addition to the offences referred to above, and depending on the circumstances of each case and the age of the victim, people involved in the planning and execution of *ukuthwala* where the consent of the intended bride is lacking could possibly be prosecuted for offences such as the following: being an accomplice to rape;⁸⁷ common law abduction;⁸⁸ kidnapping;⁸⁹ assault;⁹⁰ rape;⁹¹ statutory rape;⁹² compelling or causing a person 18 years or older to witness a sexual offence, or compelling or causing a person 18 years or older to witness a sexual act;⁹³ sexual exploitation of a child;⁹⁴ and conspiring and inducing another person to commit an offence.⁹⁵ This list is by no means exhaustive.

⁸⁶ Section 31(a) and (b) of the Transkei Marriage Act 21 of 1978.

⁸⁷ It seems that the common-law offence of being an accomplice to rape was not repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. For a discussion of this offence, see CR Snyman *Criminal Law* (2002) 446.

⁸⁸ In *S v L* 1981 (1) SA 499 (B) the court explained that this crime involves the removal of an unmarried minor from the control of his or her parents or guardian and without the consent of such parents or guardian, with the intention that the person concerned or someone else may marry or have sexual intercourse with that minor. This offence is committed against the parent or guardian and not against the minor, and the latter's consent to the acts of the wrongdoer is no defence.

⁸⁹ Which consists of depriving a person of his or her freedom of movement; and if such a person is a child, depriving the custodians of their control over the child.

⁹⁰ Which involves applying force to the person of another, or inspiring belief in another person that force is going to be applied.

⁹¹ Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that: "Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape."

⁹² Where the act of sexual penetration involved a person 12 years or older but under the age of 16 years. See section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹³ Section 8(1) and (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁴ Section 17 Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁵ Section 18(2) of the Riotous Assemblies 17 of 1956 provides as follows:

Any person who-

- (a) conspires with any other person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands, or procures, any other person to commit,

(ii) *Cultural defence and the practice of ukuthwala*

5.37 Prior to 1994, the courts considered marriages entered into without the consent of the woman to be contrary to public policy and repugnant to natural justice.⁹⁶ Where a woman was subjected to *ukuthwala* without her consent, the ensuing customary union was considered void *ab initio* as a result of the lack of consent.⁹⁷ In addition to the civil remedy of nullity, the courts made it clear that the custom of *ukuthwala* was not a defence to the common law offence of abduction; and that the custom would not be a defence to rape if it is proven (in a particular case) that the girl *bona fide* resisted intercourse.⁹⁸ In other words, the cultural defence was not recognised.

5.38 The Constitution has drastically improved the position of customary law in South African law.⁹⁹ It recognises indigenous law as part of our law. Indeed, section 211(3) instructs the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. The Constitution accords customary law the same status that other laws of the Republic enjoy. It also requires the courts to develop indigenous law in line with the rights in the Bill of Rights.¹⁰⁰

Any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

⁹⁶ *Nzimande v Sibeko* 1948 NAC 21 (C) 22-23.

⁹⁷ *Gebeleiseni v Sakumani* 106. A more recent case was reported in the media where a man was convicted of 6 counts, including 3 of rape, for abducting a 14-year-old girl without her consent or her mother's consent, *The Times* 28 January 2014 “‘*Ukuthwala*’ Reckoning” by Shanaaz Eggington

⁹⁸ See *R v Sita* 22-23. In *S v Mxhamli* the court held that observing the limitations imposed by the custom could be a mitigating factor to the crime of abduction. In this case the appellant, a 25-year-old man, was convicted of abducting a 16-year-old schoolgirl in contravention of section 115 of the Transkeian Penal Code 9 of 1983, which codified the common-law offence of abduction. He was sentenced to four months. He appealed against the prison sentence on the basis that he was merely following the culture of *ukuthwala* and that the prison sentence was therefore inappropriate. The court observed that the practice of *ukuthwala* is open to a suitor, someone who has at the very least made his desire to marry a girl known to her (or her guardian), but in this case there were no prior overtures to the girl or her guardian, and because he seduced the girl he had acted outside the parameters of the custom. The court added that if he had followed the practice as expounded by custom, it would have been a strongly mitigating factor. The court confirmed the appellant's conviction.

⁹⁹ For a general discussion on the impact of the Constitution on customary law, see para 148 of Ngcoco CJ's decision in *Bhe v Magistrate, Khayelitsha* referred to above.

¹⁰⁰ See also footnote 30.

5.39 Although the status of customary law has been ameliorated and the relationship between it and the common law has been settled, its relationship with criminal law is yet to be explored, particularly the cultural defence.¹⁰¹ This defence allows adherents of a particular culture to argue that they should be completely acquitted of criminal charges, or their blameworthiness at least be mitigated, on the ground that their cultural norms were the reason for committing the crime.¹⁰² The accused person invoking this defence would need to show, among other things, that his or her conduct conforms to the requirements of the culture. With regard to *ukuthwala*, the problem is that there seems to be no consensus on all the elements of the practice.

(c) Protection provided by civil law

5.40 Some of the civil measures available to people affected by abuses of *ukuthwala* have been referred to in the preceding paragraphs, such as a decree of nullity and the removal of a child subjected to exploitation to a place of safe care. The Promotion of Equality and Prevention of Unfair Discrimination Act¹⁰³ and the civil remedies contained therein merit discussion. This legislation applies to the State and all persons. This Act prohibits discrimination¹⁰⁴ emanating from any traditional or customary practice which impairs the dignity of women and undermines equality between men and women, including practices which undermine the dignity and wellbeing of girl children. The Act also proscribes conduct which limits women's access to education (among other things).¹⁰⁵

5.41 The prohibitions contained in this Act are justiciable. Proceedings may be instituted in the equality court by any person, a person acting on behalf of another person, a person acting in the interest of a class or group of persons, a person acting in the public interest, the South

¹⁰¹ TW Bennett "The cultural defence and the custom of *thwala* in South African law" *University of Botswana Law Journal* June 2010 3-4.

¹⁰² TW Bennett at 4.

¹⁰³ Act 4 of 2000.

¹⁰⁴ This concept is widely referred to in this Act and is defined as follows:

any act or omission, including policy, law, rule, practice, condition or situation which directly or indirectly

(a) imposes burdens, obligations or disadvantage on; or
(b) withholds benefits, opportunities, or advantages from,
any person on one or more grounds.

¹⁰⁵ Section 8(d) and (g) of the Act.

African Human Rights Commission, or the Commission for Gender Equality.¹⁰⁶ The court has wide powers and may make an appropriate order including an interim order, a declaratory order, an order for the payment of damages, an order restraining unfair discriminatory practices, and an order directing the clerk of the court to refer the matter to the Director of Public Prosecutions for possible institution of criminal proceedings.¹⁰⁷

¹⁰⁶ Section 20(1)(a)-(f).

¹⁰⁷ Section 21

CHAPTER 6

LAW REFORM OPTIONS

6.1 The discussion and analysis in the preceding chapters have led the SALRC to the conclusion that a social problem does indeed exist in South Africa. This problem is largely attributable to the spate of attacks on young girls, mainly in certain rural areas, which perpetrators attempt to justify by invoking the custom of *ukuthwala*. The preceding discussion also makes it clear that a distinction should be drawn between this known custom and the current practices, which are illegal distortions of the custom. The discussion has also raised questions about *ukuthwala* itself as a custom and whether it passes constitutional muster. In this regard, the SALRC has resolved not to enter into any debates for now, and prefers rather to assume the legitimacy of the genuine traditional types of *ukuthwala* as being a prelude to customary marriage. Customary marriage is protected by the Constitution and by the Recognition of Customary Marriages Act.

6.2 These conclusions then raise the question of what the remedy ought to be. There is no shortage of proposals and suggestions for a solution to the problem, ranging from stiffer sentences for offenders based on existing criminal law to strengthening the powers of traditional leaders to deal with the scourge. Lawyers in particular have robustly debated whether the current law (both criminal and common law) is sufficient to curb abuses of *ukuthwala* – which would mean that only its implementation needs to be strengthened; or whether new legislation needs to be enacted.

6.3 It is important to heed the views that lie behind these debates, especially the perspectives of ordinary people who have to live with the traditional practices described in the report. The SALRC has not only had the benefit of the inputs from its own preliminary consultation process but has had access to the recent report on *ukuthwala* by the CRL Rights

Commission,¹⁰⁸ which canvassed the views of representative NGOs and other civil society bodies. The richness of views regarding possible solutions to the problem is replicated in that document as well.

6.4 There is significant support for strengthening the implementation of existing legislation and common law. As shown in the Legal Framework chapter of this document, there is no shortage of domestic laws – criminal and civil – which can be used to deal with the current practices masquerading as *ukuthwala*. A simple scan of existing criminal legislation and a judicial decision or two reveal no less than ten prosecutable offences that can be pursued against an abductor and any other involved persons.¹⁰⁹ This excludes sanctions provided under civil law and other regulatory laws. The call from supporters of this approach is that these existing measures be strengthened by beefing up implementation (which essentially means detection, arrest and prosecution) and imposing stiffer sentencing upon conviction. The case of *Jezile*¹¹⁰ seems to support this approach, where the perpetrator was convicted and sentenced to 22 years, despite an appeal.

6.5 Countering such arguments are views that emphasise two considerations: that the current legislation and other relief are spread out too widely across the laws of South Africa to be readily accessible, and that a new statute would send a powerful symbolic message to perpetrators and ordinary South Africans alike. It is argued that the current law relating to the age of consent cannot be regarded as settled¹¹¹ and that a new definitive statement would go a long way towards clarifying this area of the law. The SALRC finds these arguments persuasive. There is no doubt that cases like *Jezile* demonstrate that it is possible to pursue an abductor and his accomplices on the basis of existing statutory and common law, but the symbolic and educational merits of new consolidated legislation on this matter should not be underestimated. At the end of the day this is a human rights issue, at the most topical and cutting-edge of the scale (namely the protection of the most vulnerable members of society: under-age, rural girl children). Putting aside continuing debates about culture and human rights, it is important to be

¹⁰⁸ Public Hearings and Research on *Ukuthwala*: Views and Perspectives Emerging from the South African Communities Report compiled by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

¹⁰⁹ See footnotes 87-95 in Chapter 5

¹¹⁰ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31

¹¹¹ See the discussion on the Recognition of Customary Marriages Act and the Children's Act on pages 41-47.

resolute and unambiguous in attacking those distortions that have crept into olden usages and which amount to oppression, plain and simple. We believe that a new consolidated statute is the best way to achieve this end.

6.6 In light of this, the SALRC supports the enactment of new legislation for the following reasons:

- It would offer an opportunity to make an unequivocal statement against forced marriages, clarifying in the process the question of marriageable age;
- It would consolidate the applicable principles in one instrument; and
- It would send a powerful symbolic signal in defence of women's rights.

6.7 The SALRC therefore recommends that a criminal statute be created that would do the following:

- Define "forced marriage" and "child marriage".
- Clarify the rules applicable to minors' marriages with parental consent.
- Criminalise the conduct of forcing someone into a marriage without his or her free and full consent.
- Criminalise the conduct of people who aid and abet the contracting of such marriages.
- Criminalise the conduct of the perpetrators even if the marriage did not take place.
- Contain an aggravated offence for conduct in relation to a person under the age of 18 years.

6.8 As an additional approach, it might still be necessary to supplement the effectiveness of a new statute by **amending various key enactments that already exist**, such as the Recognition of Customary Marriages Act and the Children's Act. Such amendments would insert provisions to deal specifically with some of the effects of the current abuses of *ukuthwala*.

6.9 All of this is not to say that there is no place for **non-legislative measures** in attacking the scourge of illegal practices carried out under the guise of customary marriage. There is too much at stake in terms of social cohesion and stability not to consider seriously the need to influence the habits of members of those communities where these practices are rife. The

situation is complex. Poverty plays a significant role.¹¹² Parental complicity restricts the ability or willingness of the victims to report cases of abuse.¹¹³ The sanctions imposed by the courts may overlap with traditional fines and punishments, to the confusion of communities. All of these considerations strengthen the case for non-legal interventions, which should include education, training and awareness-raising campaigns among relevant service providers, professionals, both in urban neighbourhoods and rural communities.

¹¹² See CRL Rights Commission Report at 36

¹¹³ *supra* at 33-35

DRAFT PROHIBITION OF FORCED MARRIAGES AND CHILD MARRIAGES BILL

REPUBLIC OF SOUTH AFRICA

**PROHIBITION OF FORCED MARRIAGES AND CHILD MARRIAGES
BILL**

(As introduced)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B B2015]

BILL

To introduce an expanded crime of forced marriage; to prohibit child marriages; to provide for competent verdicts in relation to forced marriages; to criminalise an attempt, conspiracy or incitement to commit an offence relating to forced marriages; to make provision for civil remedies; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

1 Definitions

“child” means a person below the age of 18 years;

“child marriage” refers to a marriage relationship or cognate union where one or both of the parties are children, and the marriage was without the consent and free will of one or both of the parties;

“cognate union” means a relationship between parties that are or were married to each other, including marriage according to any law, custom or religion; or parties that live or lived together in a relationship of the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.

“Domestic Violence Act” means the Domestic Violence Act 116 of 1998;

“forced marriage” refers to a marriage relationship or cognate union entered into without the consent and free will of one or both of the parties, and includes those marriage relationships or cognate unions purporting to be contracted in pursuit of practices such as *ukuthwala*, *shobediso*, *tjhobediso*, *kutlhaka*, *tlhakisa*, *tahisa*, *kutaha* and *tšhabiša*, *ukweba umakoti* or any similar practice;

“forced marriage protection order” means an order issued by the court to prohibit a person from committing or aiding to commit the offence of forced marriage or child marriage, or if such purported marriage has taken place, an order issued by the court compelling the respondent/s to terminate such marriage and to allow the victim to return to his or her place of residence before such purported marriage took place.

2 Objects of the Act

The objects of this Act are —

- (a) to give effect to the international law and constitutional values of human dignity;
- (b) to ensure that marriages are entered into freely and without any form of coercion;
- (c) to prohibit child marriages and forced marriages;
- (d) to provide for the prosecution of persons who commit offences provided for in the Act and for appropriate penalties.

3 Offence of forced marriage

- (1) A person commits the offence of forced marriage if he or she –
 - (a) uses violence, threats or any other form of coercion for the purposes of causing another person to enter into a marriage, and
 - (b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.
- (2) In relation to any person who by reason of mental capacity or any such reason lacks capacity to consent to a marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing that person to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form of coercion).
- (3) Any person who —
 - (a) attempts;
 - (b) conspires with any other person; or

(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit an offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

4 Offence of child marriage

(1) A person commits the offence of child marriage if he or she enters into a marriage or cognate union with a child, unless he or she complies with the provisions of the Recognition of Customary Marriage Act 120 of 1998, the Marriage Act 25 of 1961 and the Children's Act 38 of 2005.

5 Competent verdicts

If evidence on the charge of forced marriage of child marriage does not prove the offence, but proves instead –

- (a) the offence of abduction;
- (b) the offence of kidnapping;
- (c) the offence of assault;
- (d) any offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007;
- (e) any offence in terms of the Prevention and Combating of Trafficking in Persons Act 7 of 2013;

the accused may be found guilty of the offence so proved.

6 Penalties

Any person found guilty of the offences referred to in sections 3, 4 and 5 of this Act, may be liable on conviction to imprisonment for a period in line with the punishment prescribed for the offences of assault, abduction, kidnapping, rape and human trafficking or a fine or both such imprisonment or fine.

7 Civil remedies –

(1) Forced Marriage Protection Order

- (a) A Forced Marriage Protection Order is a remedy that may contain such prohibitions, restrictions, requirements or other terms as the court may consider appropriate for the purposes of the order.
 - (b) The terms of the orders may, in particular, relate to —
 - (i) conduct outside the Republic as well as conduct within the Republic;
 - (ii) respondents who are, or may become, involved in other respects as well as, or instead of, respondents who force or attempt to force, or may force or attempt to force, a person to enter into a marriage.
 - (iii) other persons who are, or may become, involved in other respects as well as respondents of any kind.
 - (c) For purposes of subsection (b) examples of involvement in other respects are —
 - (i) aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or attempt to force, a person to enter into a marriage; or
 - (ii) conspiring to force, or attempt to force, a person to enter into a marriage.
- (2) The procedure and process for the attainment of a protection order is the same as the procedure set out in the Domestic Violence Act 116 of 1998 and sections 2 to 19 of Act 116 of 1998 are *mutatis mutandis* applicable to this Act subject to amendments required by the context where appropriate.

8 Short title

The Bill is called the Prohibition of Forced Marriages and Child Marriages Bill.

SOURCE LIST

Report of the South African Law Reform Commission

South African Law Reform Commission "Preliminary investigation into the Practice of *Ukuthwala*" proposal paper June 2010

Books

Bekker JC *Seymour's Customary Law in Southern Africa* (1989)

Bekker JC, Rautenbach C & Goolam NMI *Introduction to Legal Pluralism in South Africa* 2 ed (2006)

Bennett T.W *Customary Law in South Africa* (2004)

De Waal, Currie and Erasmus *Bill of Rights Handbook* (2001)

Doke C.M, Malcolm D.M, Sikakana J.M.A and Vilakazi B.W, *English-Zulu/Zulu-English Dictionary* 2008: 811

Krige, E.J. *The Social System of the Zulus* Pietermaritzburg, Shuter & Shooter (1936)

Moletsane R "Culture, nostalgia, and sexuality education" in Mitchell, C, Strong-Wilson, T, Pithouse, K and Allnutt, S. *Memory and Pedagogy*. New York & London: Routledge (2011)

Pauw, B.A. *The Second Generation: A Study of the Family among Urbanized Bantu in East London* Cape Town, Oxford University Press (1963).

Snyman CR, in *Criminal Law* (2008)

Van Tromp *Xhosa Law of Persons: A treatise on the legal principles of family relations among the amaXhosa* (1947)

Whitfield GMB *South African Native Law* 2 ed (1948)

Cases

Jezile v S and Others (A 127/2014) [2015] ZAWCHC 31

R v Sita 1954 (4) SA 20 (E)

S v Mxhamli 1992 (2) SACR 704 (Tk)

S v L 1981 (1) SA 499 (B)

Gebeleiseni v Sakumani 1947 NAC (C&O) 105

Mkupeni v Nomungunya 1936 NAC (C&O) 77

Articles

- Bennett TW “The cultural defence and the custom of *thwala* in South African law” (2010) 10 *University of Botswana Law Journal* 3
- Capazorio B, *Man ‘kidnapped, forced girl to marry him’* available at http://www.iol.co.za/news/crime-courts/man-kidnapped-forced-girl-to-marry-him-1.1227492#.UzFGK_mnoIQ
- Koyana DS and Bekker JC “The Indomitable *Ukuthwala* custom” *De Jure* 2007
- Maluleke MJ “Culture, Tradition, Custom, Law and Gender Equality” 2012 *PER* 428
- McQuoid Mason D “The Practice of “Ukuthwala”, the Constitution and the Criminal law (Sexual Offences and Related Matters) Amendment Act” 2009 (3) *Obiter* 716
- Mdumbe MF “Cultural Practice of *ukuthwala*: Critical Appraisal of the Legal Framework and Options for Law Reform” – undated
- Mqoke R “Report on the Legal Position” – undated (SALRC Advisory Committee, Project 138)
- Mwambene, Lea and Sloth-Nielsen, Julia “Benign accommodation? *Ukuthwala*, ‘forced marriage’ and the South African Children’s Act” *Journal of Family Law and Practice* 2011 (21) 5
- Sithole, M.P. “Zulu” in Ember, M., Ember, C.R. & Skoggard, I. (eds) *Encyclopaedia of World Cultures: Supplement* New York Macmillan Reference USA (2002)
- Oosthuysen and Ngema “Ukuthwala: Structured for Relevance” 2010 *Speculum Juris* 84.

Legislation

- Riotous Assemblies Act 17 of 1956
- KwaZulu Act on the Code of Zulu Law No. 16 of 1985
- Proclamation No. R151 of 1987, Natal Code of Zulu Law
- Prevention of Family Violence Act 133 of 1993
- Recognition of Customary Marriages Act 120 of 1998
- Children’s Act 38 of 2005
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
- Prevention and Combating of Trafficking in Persons Act 7 of 2013

Other Reports and Legislation

“An exploratory report on the interplay between African customary law and practices and children’s protection rights in South Africa” Patricia Martin and Buyi Mbambo; study commissioned by the Save the Children’s Regional Office in Southern Africa, 2011

United Nations Division for the Advancement of Women “Background Paper for the Expert Group Meeting on Good Practices in Legislation to Address Harmful Traditional Practices against Women” 10 June 2009 available at
[http://www.un.org/womenwatch/daw/egm/vawlegislation_2009/Background%20paper%20EGM%20\(10.06.09\)%20FINAL.pdf](http://www.un.org/womenwatch/daw/egm/vawlegislation_2009/Background%20paper%20EGM%20(10.06.09)%20FINAL.pdf)

Report on the United Nations Children’s Fund “Early Marriage: A Harmful Traditional Practice, a statistical exploration” available at
<http://www.childinfo.org/files/childmarriageEarlyMarriageFinal.pdf>

Forced marriage – a wrong not right Consultation paper on the criminalisation of forced marriage published 01 September 2005 available at
www.scotland.gov.uk/Resource/Doc/1137/0079812.pdf

Forced Marriage (Civil Protection) Act 2007 Chapter 20 available at
www.legislation.gov.uk/ukpga/2007/20/pdfs/ukpga_20070020_en.pdf

Early marriage – a harmful traditional practice: a statistical exploration, 2005 UNICEF

Abduction for forced marriage – rights and remedies in Bangladesh and Pakistan by Sarah Hossain

Report No. 205 of the Law Commission of India on Proposal to amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws, February 2008 available at:
<http://lawcommissionofindia.nic.in/reports/report205.pdf>

Waging war against criminal element of *ukuthwala* practice (unattributed report on Lusikisiki convictions)

Report of a Roundtable held on 27 August 2009: “An Inconvenient Truth...is there a link between Harmful Traditional Practices and Sexual Violence in South Africa” Centre for the Study of Violence and Reconciliation (CSVR) – undated

Presentation on a Discussion Document on *Ukuthwaal/Tjhabisa Intombi*: “Workshop on Violation of Children’s Rights and the Practice of *Ukuthwala*” 23-24 August 2011 Department of Cooperative Governance and Traditional Affairs

Report on Workshop on the Violation of Children’s Rights through the abuse cultural practices of *ukuthwala*, held at Kopanong Conference Centre, 10 October 2011

Draft White Paper on *Ukuthwala* and Related Sources of Marriage, Heinz Kuhn and Sithole (Heinz Kuhn is Head: Legal Services, COGTA, KZN) – undated

Ukuthwala in KwaZulu-Natal: an investigation into State prevention and response, Commission on Gender Equality – undated

Seminar on *Ukuthwala* Report: *Ukuthwala* and its impact on children, Eastern Cape (Public Protector, SAHRC, CGE) 2009

The Conceptual Framework for an *Ukuthwala* Prevention Strategy targeting Traditional Leaders within the Qaukeni Kingdom, Eastern Cape (Public Protector, SAHRC, CGE) – undated

Traditional Practices and the Constitution – a policy dialogue: Implications for Human Rights and Gender Equality, KZN Legislature. Pietermaritzburg (CGE, Department of Social Development, UNFPA) 04 November 2009

Public Hearings and Research on *Ukuthwala*: Views and Perspectives Emerging from the South African Communities Report compiled by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities